United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

879

No. 17,964

ISAAC WILLIAMS,

Appellant,

v.

UNITED STATES,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

	Page
Complaint, Filed in the District of Columbia Court of General Sessions on March 6, 1963	1
Presentment of the Grand Jury Dated March 26, 1963 and Filed April 8, 1963	3
Indictment, Filed April 8, 1963	4
Plea of Defendant, Filed April 15, 1963	5
Instructions to Jury - Defendant's Prayer No. 1, Filed May 16, 1963	5
Instructions to Jury - Defendant's Prayer No. 2	6
Verdict, Filed May 16, 1963	6
Motion for New Trial, Filed May 23, 1963	7
Denial of Defendant's Motion for New Trial, Filed June 17, 1963	8
Judgment and Commitment, Filed June 18, 1963	9
Notice of Appeal, Filed June 24, 1963	9

JOINT APPENDIX

Form 18 GJ 266-63

DISTRICT OF COLUMBIA
COURT OF GENERAL SESSIONS
Criminal Division
Case No._____
UNITED STATES
vs.
Isaac Williams
Charge
ADW

The Clerk of the Court will please enter my appearance for the defendant in the above entitled cause.

Wm. Bachrach
Attorney
Address 517 - F St., N. W.
Phone Metropolitan 8-1007
March 1, 1963

_____Precinct
No. US 1213-63

UNITED STATES
vs.
Isaac Williams
1227 Eye St., S. E.
Atty. Bachrach
COMPLAINT
Assault with a dangerous weapon Cepi

WITNESSES

Chalra Hicklin, 2017 1st St., N. W.

Pauline Smith, 613 K St., N. E.

Claude West, 308 Bryant St., N. E.

Elaine Mitchell, 447 Mass. Ave., N. W.

Irma J. Johnson, 729 2nd St., N. W.

Edward Howery, 1227 Eye St., S. E.

Albert G. Manfredi #2

March 5, 1963

Hearing held — Hearing waived

Held to await the action of the Grand Jury

Bond set in the sum of $1000 to appear in The United States District Court for the District of Columbia.

Released on bond _____ 19___

_____

Surety

---

* * *

March 1, 1963

CONTINUED TO 3-5-63

Request of (✓) Gov't ( ) Deft

BOND set at $ * * *

NOTE: (Witnesses not present.)

[Filed February 11, 1963]

CRIMINAL DIVISION

District of Columbia Court of General Sessions

COMPLAINT 317-63

Affidavit No. USW 486-'63

WHEREAS Albert G. Manfredi hath upon oath before me Robert E. Gaskins, a Deputy Clerk of The D. C. Court of General Sessions, made complaint and declared that on the 9th day of February, A.D. 1963, at the District aforesaid, one Isaac Williams did then and there unlawfully make an assault upon one Charles Hicklin with a certain dangerous weapon to wit: a Pistol against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

WITNESS, The Honorable John Lewis Smith, Jr., Chief Judge of The D. C. Court of General Sessions, and the seal of said Court this 11th day of Feb., A.D. 1963.

WALTER F. BRAMHALL
Clerk,
D. C. Court of General Sessions

[Filed in Open Court April 8, 1963]

UNITED STATES DISTRICT COURT

for the District of Columbia

HOLDING A CRIMINAL TERM

G.J. No. 266-63

District of Columbia) to wit: March GJ 1963
Sworn in March 5, 1963 Term, A.D. 19__

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do PRESENT Isaac Williams

vis: Assault with a Dangerous Weapon at the District aforesaid, on the 26 day of March, A.D. 1963.

/s/ Clinton N. Marsh
Foreman

[Filed in Open Court April 8, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on March 5, 1963

The United States of America	:	Criminal No. 317-63
v.	:	Grand Jury No. 266-63
Isaac Williams	:	Violation: 22 D.C.C. 502 (Assault With Dangerous Weapons)

The Grand Jury charges:

On or about February 9, 1963, within the District of Columbia, Isaac Williams made an assault on Charles R. Hicklin with dangerous weapons, that is, a bottle and a bar stool.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:
/s/ Clinton N. Marsh
Foreman

[Filed April 15, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

vs. Criminal No. 317-63

ISAAC WILLIAMS Charge - Vio. 22 DCC 502

Defendant

PLEA OF DEFENDANT

On this 15th day of April, 1963, the defendant Isaac Williams, appearing in proper person and by his attorney, Stephen Delisio, Esquire, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

By direction of

Leonard P. Walsh
Presiding Judge
Criminal Court #1

* * *

[Filed May 16, 1963]

INSTRUCTIONS TO JURY

DEFENDANT'S PRAYER NO. 1

A witness may be discredited or impeached by contradictory evidence, or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust that witness' testimony in other particulars: and you may reject all the testimony of that witness

or give it such credibility as you may think it deserves.

[Denied as framed - H.A.S.]

/s/ Henry J. Price
424 Fifth Street, N.W.
Washington 1, D. C.

Counsel for Defendant
(Appointed by this Court)

[Filed May 16, 1963]

INSTRUCTIONS TO JURY

DEFENDANT'S PRAYER NO. 2

You are instructed that in order to find the defendant, Isaac Williams, guilty of the crime of assault with a dangerous weapon, you must find that he struck the complainant, Charles Hicklin, with the weapon with criminal intent. That is, you must find beyond a reasonable doubt that he did not do it accidentally or unintentionally. ~~If you find~~ from all the evidence that the Government has not proved beyond a reasonable doubt that Isaac Williams did not accidently strike the complainant in an effort to avoid being shot by Roy Butler, you must ~~find~~ him not guilty.

[Denied as framed - H.A.S.]

/s/ Henry J. Price
424 Fifth Street, N.W.
Washington 1, D. C.

Counsel for Defendant
(Appointed by this Court)

[Filed May 16, 1963]

[VERDICT]

On this 16th day of May, 1963, came again the parties aforesaid, in manner as aforesaid and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon after hearing the instructions of the Court the alternate juror is discharged and the jury retires to deliberate; thereupon the jury returns into court and upon their oath say that the defendant is guilty as indicted.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District of Columbia Jail.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court #6

* * *

[Filed May 23, 1963]

MOTION FOR NEW TRIAL

Comes now the defendant, Isaac Williams, by his court-appointed attorney, Henry J. Price, and moves the Court to grant him a new trial.

As grounds for the above motion, defendant states as follows:

1. The Court erred in refusing to instruct the jury on simple assault. Such instruction was supported by the evidence in that the jury could have believed that the defendant ran into the complaining witness at the door of the Starlight Grill, knocked him to the floor, and that he cut his face on broken glass when he fell. Such an instruction is required even where the explanation which the jury is asked to accept is "implausible, unreliable, and incredible" or the source "could well be regarded as of dubious reliability." Young v. United States ___U.S. App. D.C.___ 309 F. 2d 662 (1962).

2. The court erred in instructing the jury to deliberate with a view to being convinced by arguments of fellow jurors. As a result of this instruction the jury may have felt a duty to agree on a verdict contrary to their personal opinion since they were not admonished not tc yield conviction conscientiously arrived at. United States v. Smith, 303 F. 2d 341 (4 Cir. 1962); United States v. Rogers, 289 F. 2d 433 (4 Cir. 1961); Green v. United States, 309 F. 2d 852 (5 Cir. 1962).

3. The Court erred in refusing to produce the grand jury minutes of witness Charles R. Hicklin after inconsistencies were demonstrated

between Hicklin's current testimony and his prior testimony both at the preliminary hearing and in his statement to the grand jury secretary. See Harrell v. United States, No. 17350, April 18, 1963. Since Hicklin's testimony as to his position in the restaurant when he was struck was contradicted both by defense witness James Morton and by the defendant himself, his grand jury testimony should have been produced under the rationale of Gordon v. United States, ___U.S. App. D.C.___, 313 F. 2d 582 (1962).

Respectfully submitted,

/s/ Henry J. Price

424 Fifth Street, N. W.,
Washington 1, D. C.

Counsel for Defendant
(Appointed by this Court)

[Certificate of Service]

[DENIAL OF DEFENDANT'S MOTION FOR NEW TRIAL]

[Filed June 17, 1963]

On this 17th day of June, 1963, came the attorney of the United States; the defendant in proper person and by his attorney, Henry J. Price, Esquire; whereupon the defendant's motion for new trial, coming on to be heard, after argument by counsel, is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

Henry A. Schweinhaut
Presiding Judge
Criminal Court #6

* * *

[Filed June 18, 1963]

JUDGMENT AND COMMITMENT

On this 17th day of June, 1963 came the attorney for the government and the defendant appeared in person and by counsel, Henry J. Price, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ASSAULT WITH DANGEROUS WEAPONS as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years to Six (6) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ H. A. Schweinhaut
United States District Judge.

* * *

[Filed June 24, 1963]

NOTICE OF APPEAL

Name and address of appellant - Isaac Williams, 1227 I Street, S. E.

Name and address of appellant's attorney - Henry J. Price, 424 Fifth Street, N. W.

Offense - Assault with dangerous weapon 22 D.C.C. 502.

Concise statement of judgment or order, giving date, and any sentence - Guilty verdict by jury on May 16, 1963. New trial motion denied and def. sentenced on June 17, 1963.

Name of institution where now confined, if not on bail - District Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

June 24, 1963
Date

/s/ Isaac Williams
Appellant

/s/ Henry J. Price
Attorney for Appellant.

BRIEF FOR APPELLANT ISAAC WILLIAMS

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v. No. 17,964

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GEORGE BLOW
VANCE A. FISHER

701 Union Trust Building
Washington 5, D. C.

Attorneys for Appellant
(By Appointment of This Court)

September 13, 1963

STATEMENT OF QUESTIONS PRESENTED

Appellant was convicted in a jury trial upon an indictment charging assault with dangerous weapons, a bottle and a bar stool. The questions presented follow:

I. Whether the Court erred in refusing to order the production of the transcript of the testimony of an important witness before the grand jury when there appeared to be an inconsistency between his testimony at the trial and his testimony before the grand jury.

II. Whether, when the testimony of a witness for the prosecution tended to justify his own conduct in shooting the defendant, counsel for appellant should be permitted upon a preliminary showing to the Court that the witness for the prosecution was charged with the shooting to inquire concerning the charge and the disposition made, if any.

III. Whether, in a trial upon an indictment for assault with dangerous weapons where there was some evidence that the assault may have been committed without weapons, the Court should have granted the defendant's request that it instruct the jury that the defendant might be found guilty of simple assault.

IV. Whether the Court erred in instructing the members of the jury sua sponte prior to their retirement to deliberate that they should "listen to each other with a view to being convinced by what your fellow jurors have to say to the end that your verdict will be a unanimous verdict and a true verdict," without cautioning them at the same time that a member of the jury should not yield a position conscientiously held.

BRIEF FOR APPELLANT ISAAC WILLIAMS

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v. No. 17,964

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

	Page
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CITATIONS	vii
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATUTES AND RULES INVOLVED	5
STATEMENT OF POINTS	7
SUMMARY OF ARGUMENT	9
ARGUMENT	12
I. THE TRIAL COURT'S REFUSAL TO ORDER THE PRODUCTION OF THE TRANSCRIPT OF THE TESTIMONY OF A KEY GOVERNMENT WITNESS BEFORE THE GRAND JURY, WHEN PROBABLE INCONSISTENCY HAD BEEN DEMONSTRATED, CONSTITUTED PREJUDICIAL ERROR	12
A. The Denial of the Request for Production and the Proceedings Prior Thereto	12
B. The Probable Inconsistency Between the Witness' Testimony At the Trial and Before the Grand Jury Necessitated Production of the Transcript	16
C. The Denial of Production Here Constituted Prejudicial Error	17

Page

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ALLOW INQUIRY ON CROSS-EXAMINATION AS TO WHETHER AN IMPORTANT WITNESS FOR THE PROSECUTION WAS CHARGED WITH A CRIME, AND THE CIRCUMSTANCES SURROUNDING THE CHARGE OR ITS ABSENCE, TO DETERMINE POSSIBLE INTEREST OR BIAS 20

A. The Proceedings Surrounding the Inquiries 20

B. The Trial Court's Refusal to Permit Appellant to Inquire As to Butler's Interest in the Outcome of the Litigation Was Prejudicial Error 23

III. ALTHOUGH APPELLANT WAS INDICTED FOR ASSAULT WITH DANGEROUS WEAPONS, THERE WAS SOME EVIDENCE OF HIS COMMISSION OF MERELY A SIMPLE ASSAULT: THEREFORE, THE COURT'S REFUSAL TO PERMIT THE JURY TO FIND APPELLANT GUILTY OF THE LESSER INCLUDED OFFENSE WAS PREJUDICIAL ERROR 28

A. The Submission to the Jury of the Issue of Lesser Included Offense Is Required If There Is Some Evidence to Support It; Failure to Do So Is Prejudicial Error 28

B. Simple Assault Is a Lesser Offense Necessarily Included in the Charge of Assault with Dangerous Weapons. . 31

C. The Evidence in This Case Required the Submission of the Issue of Simple Assault 32

Page

IV. THE TRIAL COURT'S FINAL INSTRUCTION TO THE JURY URGING THEM TO AGREE TO A UNANIMOUS VERDICT WAS PLAIN, PREJUDICIAL ERROR 41

A. The Circumstances and Nature of the Charge 41

B. The Charge, As Given, Constituted Reversible Error . . . 42

C. The Court's Charge Was Plain Error Affecting Substantial Rights Which May Be Noticed By This Court 48

V. CONCLUSION 50

TABLE OF CITATIONS

Cases: Page

*Alford v. United States, 282 U.S. 687 (1931) . . 24, 25, 26

Allen v. United States, 164 U.S. 492 (1896) . . . 41

*Berra v. United States, 351 U.S. 131 (1956) . . . 29, 31

*Bollenbach v. United States, 326 U.S. 607 (1946) 47

*Brasfield v. United States, 272 U.S. 448 (1926) . 48-49

Burcham v. United States, 82 App. D.C. 283, 163 F.2d 761 (1947) 30

Coleman v. United States, 111 App. D.C. 210, 295 F.2d 555 (1961), cert. denied, 369 U.S. 813 (1962) 30

*DeBinder v. United States, 110 App. D.C. 244, 292 F.2d 737 (1961) 16, 17, 18

District of Columbia v. Clawans, 300 U.S. 617 (1937) 24

*Eagleston v. United States, 172 F.2d 194 (9th Cir. 1949), cert. denied, 336 U.S. 952 (1949). 32

Gordan v. United States, 112 App. D.C. 33, 299 F.2d 117 (1962). 18

Green v. United States, 95 App. D.C. 45, 218 F.2d 856 (1955). 30

*Green v. United States, 309 F.2d 852 (5th Cir. 1962). 42, 43, 44 47

*Harrell v. United States, No. 17, 350, 317 F.2d 580 (D.C. Cir. 1963). 17, 18

*Huffman v. United States, 297 F.2d 754 (5th Cir. 1962). 49

Jencks v. United States, 353 U.S. 657 (1957) . . 16

---

* Cases principally relied upon.

Cases: Page

Kitchen v. United States, 92 App. D.C. 382, 205 F.2d 720 (1953). 30

*Larson v. United States, 296 F.2d 80 (10th Cir. 1961) 29, 31

*MacIllrath v. United States, 88 App. D.C. 270, 188 F.2d 1009 (1951). 29, 32

*Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), rehearing denied, 361 U.S. 855 (1959). 9, 16

*Powell v. United States, 297 F.2d 318 (5th Cir. 1961) 44

*Rhodes v. United States, 282 F.2d 59 (4th Cir. 1960) .45

*Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946) 25

*Simmons v. United States, 113 App. D.C. 369, 308 F.2d 324 (1962) 17, 18

*Spaeth v. United States, 232 F.2d 776 (6th Cir. 1956) 25

Sparf v. United States, 156 U.S. 51 (1895) 30

State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959) . 42

*Stevenson v. United States, 162 U.S. 313 (1896) . . 28, 30, 31 39

*United States v. Masino, 275 F.2d 129 (2d Cir. 1960). 25, 26

*United States v. Rogers, 289 F.2d 433 (4th Cir. 1961) 42, 43, 45, 47

*United States v. Smith, 303 F.2d 341 (4th Cir. 1962) . 43

*Villaroman v. United States, 87 App. D.C. 240, 184 F.2d 261 (1950) 26

*Young v. United States, ___App. D.C. ____, 309 F.2d 662 (1962) 29, 30, 31 39

---

* Cases principally relied upon.

Statutes and Rules:	Page
18 U.S.C. § 3500	16
*22 D.C. Code § 502	5, 32
*22 D.C. Code § 504	6, 32
*Fed. R. Crim. P. 6(e)	6, 16
Fed. R. Crim. P. 30	6, 48
*Fed. R. Crim. P. 31(c)	7, 28, 29
*Fed. R. Crim. P. 52(b)	7, 48, 49

* Statutes and Rules principally relied upon.

STATEMENT OF JURISDICTION

A jury convicted (J.A. 6-7) appellant on an indictment charging assault with dangerous weapons, a bottle and a bar stool (J.A. 4). Appellant was sentenced by the Honorable Henry A. Schweinhaut on June 17, 1963, to from two (2) to six (6) years imprisonment (J.A. 9). A motion for a new trial was denied on June 17, 1963 (J.A. 8). On June 24, 1963, Judge Schweinhaut granted appellant's motion for leave to appeal in forma pauperis, and ordered preparation of the transcript at government expense. The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Following a disturbance at the Starlight Grill, 436 L Street, N.W., on Saturday night, February 9, 1963 (Tr. 13, 181-2), appellant and one Charles L. Hicklin were hospitalized (Tr. 268-9, 324-7). The appellant had a gun shot wound in his left side (Tr. 49). Hicklin had a superficial cut in his left forehead (Tr. 324-7). The appellant had been shot by one Roy Thomas Butler, proprietor of the grill. Two days later Officer Albert G. Manfredi filed a complaint in the District of Columbia

Court of General Sessions which charged the appellant with an assault upon Hicklin "with a certain dangerous weapon to wit: a pistol. . . ." (J.A. 3.) Whether Butler was charged is not known (Tr. 350-351). On March 26, 1963, appellant was presented by the grand jury for "Assault with a Dangerous Weapon. . . ." (Tr. 3-4.) In an indictment filed on April 8, 1963, the grand jury charged appellant with an assault on Hicklin "with dangerous weapons, that is, a bottle and a bar stool." (J.A. 4.)

At the trial, which began May 13, 1963, there was testimony by prosecution witnesses that appellant was drinking at the Starlight Grill, 436 L Street, N. W., Washington (Tr. 13, 45); and that around 11:00 p.m., Hicklin entered and sat down (Tr. 45). There was testimony that appellant walked up to Hicklin and, without provocation, hit him in the head with a beer bottle, knocking him to the floor; jabbed him in the head with the remains of the bottle, which had broken; and hit him with a bar stool (Tr. 45-46, 156). There was testimony that one Roy Thomas Butler, proprietor of the Grill, was behind the bar (Tr. 38, 42). He fired two shots, one of which hit appellant in the side (Tr. 46-49), and that appellant then crawled out the door.

Appellant and a defense witness, one James Morton, testified to a quite different occurrence. Appellant's testimony (Tr. 206-208) was that, while attempting to flee Butler's shots, he might have collided with Hicklin at the door. He denied any assault at the bar. Morton corroborated and amplified this testimony (Tr. 283-285, 289). He testified to an argument between Butler and appellant, prior to the shots. He saw no beer bottle in appellant's hand. Butler, he testified, then fired a shot. Appellant ran into Hicklin at the door. Then Butler shot appellant. The examining physician found Hicklin's injury to consist of a single laceration, "not very severe." (Tr. 326, 328.) Appellant, on the other hand, had a gun shot wound in his side (Tr. 49).

A. <u>The Refusal To Produce The Grand Jury Testimony Of Mr. Hicklin</u>

At the trial, Hicklin acknowledged that he had testified before the Grand Jury concerning the occurrence (Tr. 197-198). His testimony before the Grand Jury, he further admitted, was that he was hit immediately upon entering the bar (Tr. 199-201). His testimony at the trial was that he walked into the bar, looked around, and sat at the bar about midway down its length (Tr. 11-16).

On the basis of this inconsistency, which bore on an essential point of conflict between the prosecution's case and the defendant's case, appellant moved for production of the testimony of Hicklin before the Grand Jury (Tr. 200-201). The motion was denied (Tr. 201).

B. Limitation of Cross-Examination

During a conference at the bench appellant's attorney elicited a statement that Butler had been booked with assault with a dangerous weapon (Tr. 350). Appellant's attorney attempted to inquire of Butler as to this fact, but was not permitted to do so (Tr. 351).

C. The Denial of the Instruction on Simple Assault

Notwithstanding the conflict between defense and prosecution witnesses as to the circumstances of the alleged assault, the trial court refused appellant's request for an instruction on simple assault (Tr. 385, 427).

D. The Final Instructions to the Jury

In charging the jury, after ruling on requests for instructions, the court sua sponte gave its final instruction, which began and ended thus:

> "Ladies and gentlemen, your verdict must be unanimous. . . . Listen to each other with a view to being convinced by

> what your fellow jurors have to say to the end that your verdict will be a unanimous verdict and a true verdict." (Tr. 439.)

The jury was excused, and returned one hour and thirty-seven minutes later with a verdict of guilty (Tr. 439-441, J.A. 6-7).

Appellant moved for a new trial, assigning as grounds errors by the Court in (1) its refusal to instruct the jury on simple assault; (2) its charge to the jury instructing that they deliberate with a view to being convinced by each other's arguments; and (3) its refusal to produce the grand jury minutes of Hicklin's testimony. The motion was denied (J.A. 7, 8).

On June 17, 1963, appellant was sentenced to from two to six years' imprisonment. An appeal was taken from the judgment and the denial of the motion for a new trial on June 24, 1963 (J.A. 9).

STATUTES AND RULES INVOLVED

District of Columbia Code, Title 22, Section 502:

> "Assault With Intent to Commit Mayhem or With Dangerous Weapon
>
> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804.)"

District of Columbia Code, Title 22, Section 504:

> "Assault or Threatened Assault in a Menacing Manner.
>
> "Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 806.)"

Federal Rule of Criminal Procedure 6(e):

> "Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Federal Rule of Criminal Procedure 30:

> "Instructions
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on

the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Federal Rule of Criminal Procedure 31(c):

"Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Federal Rule of Criminal Procedure 52(b):

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. Where a key government witness testified on a material matter, and on cross-examination admitted having testified differently before the grand jury, appellant's motion for production of the witness' grand jury testimony should have been granted. The trial court's denial of the motion was error requiring remand for production of the testimony.

2. Where an important government witness who shot appellant with a pistol testified on a material matter, which testimony tended to justify his shooting and wounding appellant, and appellant endeavored on cross-examination to inquire as to whether the witness had been charged with a crime by the government, the trial court should have permitted the inquiry, and development of the witness' answer, in order to establish his interest. The trial court's refusal to permit the inquiry is a sufficient reason for reversing the judgment below.

3. Where appellant was charged with assault with dangerous weapons, and where there was some evidence at the trial tending to show that appellant had committed only simple assault on the alleged victim, appellant was entitled to an instruction under which the jury might find appellant guilty of simple assault, an offense necessarily included in the offense charged. The trial court's refusal to grant appellant's request for such an instruction is, in itself, sufficient reason for reversing the judgment below.

4. Where in a criminal case the trial court sua sponte admonished the members of the jury, prior to their retiring, that they should "listen to each other with a

view to being convinced" so that their verdict would be "unanimous" and "true", without further charging that they should not yield a position conscientiously held, plain error affecting substantial rights was committed. This error is also sufficient in itself to require reversal of the judgment below.

SUMMARY OF ARGUMENT

I

A key government witness admitted on cross-examination that he had testified on a material matter before the grand jury which indicted appellant in a manner inconsistent with his prior testimony at the trial. Appellant's motion for production of the witness' grand jury testimony was denied. It has long been held in this Circuit that, upon such a showing of probable inconsistency between the minutes of the grand jury and the testimony at trial, it is reversible error to deny production of the grand jury testimony, such a showing constituting the requisite "particularized need" required by Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), rehearing denied, 361 U.S. 855 (1959).

II

Another important witness for the prosecution, the alleged recipient of appellant's alleged assault, was implicated in a conference at the bench, by a statement shown the judge, as having been himself charged with assault in shooting appellant. The Court, however, refused to allow appellant to cross-examine the witness as to whether or not he was so charged. It is well settled that the interest, or motive, of a witness is a proper subject for cross-examination. The inquiry here, and further inquiry developing the original answer, are well within the scope of this rule. Denial of appellant's right to such cross-examination thus constituted reversible error.

III

There was testimony that the incident occurred in quite a different manner than that testified to by certain prosecution witnesses; in particular, that neither weapon was in the possession of appellant at the time of the alleged assault. It has long been settled that where there is some evidence from which a jury might find commission of a lesser offense necessarily included in the offense charged, failure to give the issue to the jury is prejudicial error requiring reversal. Simple assault is

such a lesser included offense, necessarily included in the offense charged.

IV

The trial judge's final instruction to the jury urged them to agree to a unanimous verdict and to listen to fellow jurors with a view to being convinced, without adding the ameliorating caveat that no juror should yield a position or view conscientiously held. Such a charge even with the caveat is dangerous for, in the posture of the case at the time the jury retires, it suggests to the jurymen that it is to the fellow jurors and not the evidence that the minority juryman should listen in resolving the question of guilt. Without the caveat, it is fatally defective and reversible error. Coming as it did, without warning after counsel's objections on the instructions thus far had been heard, it could not be completely remedied. Plain error affecting substantial rights resulted, which appellant could not effectively present to the court below save in his motion for a new trial.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO ORDER THE PRODUCTION OF THE TRANSCRIPT OF THE TESTIMONY OF A KEY GOVERNMENT WITNESS BEFORE THE GRAND JURY, WHEN PROBABLE INCONSISTENCY HAD BEEN DEMONSTRATED, CONSTITUTED PREJUDICIAL ERROR.

A. The Denial of the Request for Production and the Proceedings Prior Thereto.

Appellant's version of the case differed from the prosecution's in at least one significant particular. The witness for the defense, Morton, testified to a collision or tussle between appellant and Hicklin at the door of the bar, after Butler's first shot, whereas witnesses for the prosecution testified to an assault some distance inside the bar, prior to Butler's shots. Of all the prosecution's eye witnesses to the occurrence, all but one, Hicklin, the alleged victim, had strong potential bias, or interest in the outcome of the litigation. Butler, the bartender who fired the shots, was subject to possible criminal prosecution for his conduct; Elaine Mitchell was a friend of Butler who regularly sat with him during her frequent visits to the bar (Tr. 173, 274-276); Pauline Smith was an employee (Tr. 143) and a friend (Tr. 145) of Butler. The trial judge recognized this in a colloquy

at the bench relating to the propriety of examination of Mrs. Mitchell as to an alleged illicit relationship with Butler:*/

[THE COURT:]

> "Now, if these people are being brought in to perjure themselves just to keep Butler from being charged with this offense or, as you earlier argued, Mr. Price, to protect him for an assault, just putting the fix on the defendant, then she would have an interest in the case and a bias and a prejudice in favor of Butler.
>
> * * *
>
> "And therefore counsel would be entitled to impeach her testimony if he could, in order to show such bias and prejudice as a possible reason for her testimony.
>
> * * *
>
> "It may show a bias in favor of Butler to the extent of protecting him and putting the blame for Hicklin's condition on Williams." (Tr. 221-223.)

Only Hicklin, therefore, was relatively disinterested in the litigation, the parties, and the other witnesses. His testimony, therefore, was of utmost importance.

Hicklin testified at first that he walked into the bar, looked around, and sat at the bar about midway

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*/ Birth certificates of two children of Mrs. Mitchell, in which the father's name, alone, was left out, were ultimately described to the jury by the Court for their consideration, although not admitted into evidence. (Tr. 364.)

down its length (Tr. 11-16). Subsequently, Hicklin was asked by defense counsel whether he had testified before the grand jury in the case (Tr. 197). He acknowledged that he had, and also acknowledged that he had made a statement to the secretary outside. This statement had been typed in summary form, read to Hicklin, and acknowledged by him to be true (Tr. 198). This statement was shown to defense counsel, and the following proceedings took place:

> [BY MR. PRICE:]
>
> "Q. Now, Mr. Hicklin, do you remember in that statement to this individual before testifying before the grand jury saying that when you went to the Starlight Grill just as soon as you got in the door a fellow named Dutch called you and you were hit immediately at the same time?
>
> "A. I recall saying this, sir. I entered the door, and from two to three stools back, I walked to the stool; and I sit down beside Elaine Mitchell; and that is all I remember.
>
> "THE COURT: The question was whether or not when you got in there somebody named Dutch called to you?
>
> "THE WITNESS: Someone called me, Your Honor; and I looked around. I don't recall exactly who it was.
>
> "BY MR. PRICE:
>
> "Q. All right. Do you remember saying, Mr. Hicklin, to this secretary--
>
> "THE COURT: Or clerk.

"BY MR. PRICE:

"Q. Or clerk that just as soon as you got in the door someone called you and you were hit? Do you remember saying that?

"A. I said that, yes.

"Q. Just as soon as you got in the door?

"A. Well, yes.

"THE COURT: He has told you what just as soon as he got in the door meant. He just told you on this recall, and he told you on the original cross examination.

* * *

"MR. PRICE: If Your Honor please, may we approach the bench?

"THE COURT: Yes.

(AT THE BENCH)

"MR. PRICE: I would move on the basis of this statement, Your Honor, the man indicating that he got hit just inside the door, although he has later explained it, I would ask for production of his grand jury testimony to determine--

"THE COURT: I deny it.

"MR. PRICE: All right.

(IN OPEN COURT)

"MR. PRICE: I have nothing further." (Tr. 199-201, emphasis added.)

The Court, at the very least, should have examined the transcript.

B. The Probable Inconsistency Between the Witness' Testimony at the Trial and Before the Grand Jury Necessitated Production of the Transcript.

As noted above, the testimony of Hicklin was of singular weight. It had been established by production of the summary of the witness' testimony before the grand jury that he had testified differently before the grand jury than he did at the trial. Under these circumstances, production of the transcript of the grand jury proceedings for inspection by the Court was required.

The Supreme Court has never clearly demarcated the circumstances under which production of grand jury testimony is required. It has held, however, that the Jencks case*/ and the "Jencks Act"**/ do not govern; the question is one of the interpretation of Fed. R. Crim. P. 6(e). Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), rehearing denied, 361 U.S. 855 (1959). A "particularized need" must be shown. Ibid. When such a "particularized need" is shown, however, it is an abuse of the court's discretion to refuse production. DeBinder v. United States, 110 App. D.C. 244, 292 F.2d 737 (1961),

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*/ Jencks v. United States, 353 U.S. 657 (1957).
**/ Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595, 18 U.S.C. § 3500 (1958 ed.)

and a showing of probable inconsistency is sufficient to establish a "particularized need" for production. In DeBinder v. United States, supra, probable inconsistency was shown from testimony of a defense witness that the complaining witness had previously identified defendant's twin brother as the intruder, which identification the complaining witness denied having made. In Simmons v. United States, 113 App. D.C. 369, 308 F.2d 324 (1962), probable inconsistency appeared from the variance between prosecution's opening statement and the testimony of the complaining witness. In Harrell v. United States,___ App. D.C.___, 317 F.2d 580 (1963), inconsistency was admitted. In all three, denial by the trial court of production of the testimony of the witness before the grand jury was error. So in the present case, the testimony of Hicklin was demonstrated, on his cross-examination, to be inconsistent with that given before the grand jury. The extent of the inconsistency could only be ascertained by production of the minutes.

C. The Denial of Production Here Constituted Prejudicial Error.

That Hicklin was an important witness cannot be doubted. In these circumstances, the failure of the trial

court to order the production of the grand jury testimony for its inspection is prejudicial error. DeBinder v. United States, supra (only eye-witness); Simmons v. United States, supra ("important" prosecution witness); Harrell v. United States, supra ("principal witness").*/ It was clearly prejudicial here. Hicklin's testimony, ostensibly that of a disinterested bystander, cannot but have been given great weight by the jury in rejecting the testimony of the defense witnesses.

The prejudice is increased where, as here, the court comments in its statements to the jury in open court that he believes the inconsistency is due to the witness' ignorance of the language.

> "THE COURT: He has told you what just as soon as he got in the door meant. He just told you on this recall, and he told you on the original cross-examination." (Tr. 200.)

As stated by this Court in Harrell v. United States, supra at 581:

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*/ The Court's dictum in Gordan v. United States, 112 App. D.C. 33, 299 F.2d 117, 118-119 (1962), Judge Bazelon, dissenting, that the witness involved must be the sole witness for the prosecution, is to be distinguished. There there was no preliminary showing of probable inconsistency, and production was ordered solely on the basis of contradiction of the prosecution's sole witness by the defense's sole witness. The dictum is thus limited to an issue quite different from that presently before the court.

> "Not having seen the grand jury testimony, the trial judge was in no position even to speculate on what effect its disclosure might have had on [the witness'] credibility, with him or with the jury. . . . Disclosure of his grand jury testimony might well have been helpful to the court, and to the jury, in determining which part, if any, should have been [credited]."

It is not for the trial judge to hypothesize -- much less to comment upon -- the extent or severity of the contradiction, when he has not seen the transcript of the grand jury proceedings. To go further and aggravate the error by such comment can only increase the prejudice to the accused.

Accordingly the Court in this case should remand the cause for production of the transcript, its inspection by the Court, and such further proceedings as from such inspection may appear to be necessary. If the Court finds that a new trial is necessary in this case on one of the grounds hereafter urged, a ruling might properly be made on this question for the guidance of the Court and counsel below.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ALLOW INQUIRY ON CROSS-EXAMINATION AS TO WHETHER AN IMPORTANT WITNESS FOR THE PROSECUTION WAS CHARGED WITH A CRIME, AND THE CIRCUMSTANCES SURROUNDING THE CHARGE OR ITS ABSENCE, TO DETERMINE POSSIBLE INTEREST OR BIAS.

A. The Proceedings Surrounding the Inquiries

As noted in Part I, Hicklin was unsure just where he was and what happened to him. Butler, the bartender with the gun, on the other hand, testified flatly that Hicklin just walked in, looked around, sat down, and was hit on the head with a bottle (Tr. 45-49). He also testified that he shot appellant after appellant had struck Hicklin with a bottle and while he was beating Hicklin with a bar stool (Tr. 46-49). It was an important theory of the defense that any assault which had taken place occurred as a result of Butler's unprovoked shooting of appellant, while appellant was attempting to flee (Tr. 10-11). Defense counsel endeavored, by inquiry of Butler on cross-examination, to cause Butler to admit that he had unjustifiably shot appellant, that appellant collided with Hicklin at the door while attempting

to flee, and that Butler was aware that if that were the case, Butler would be subject to criminal prosecution (Tr. 85). The court refused to permit the inquiry as to Butler's awareness of being thus subject to a criminal charge:

> [BY MR. PRICE:]
>
> "Q. Now, you are aware, are you, Mr. Butler, that if that is what happened that you would be subject to a charge--
>
> "MR. COLLINS: Objection.
>
> "THE COURT: Don't answer that.
>
> "BY MR. PRICE:
>
> "Q. Are you also aware, Mr. Butler, that if that is what happened--
>
> "MR. COLLINS: Objection to that type of question, your honor.
>
> "THE COURT: Sustained." (Tr. 85.)

Subsequently, defense counsel attempted on further cross-examination to inquire of Butler as to whether or not he had in fact been charged, confronting him with a statement taken by the Homicide Squad that Butler had been charged with assault with a dangerous weapon. The Court, sustaining the prosecution's objection, refused to permit Butler to answer:

[AT THE BENCH]

"THE COURT: What do you want to ask him about this thing you gave him, which is a police--

"MR. COLLINS: A statement taken by the Homicide Squad. That wasn't taken by No. 2.

"THE COURT: It says that Butler was charged with assault with a dangerous weapon at the Second Precinct by Private Manfredi.

"What do you want to ask him?

"MR. PRICE: I want to ask him if he was charged.

"THE COURT: You know he wasn't.

"MR. COLLINS: I object to that.

"MR. PRICE: I want to ask him if he was charged with assault with a dangerous weapon at the precinct.

"MR. COLLINS: He is trying to impeach him without a conviction.

"THE COURT: I won't permit that.

"MR. PRICE: Even on the basis of this statement?

"THE COURT: No, it doesn't make any difference if the Police Precinct charged him with murder -- it doesn't make any difference -- he wouldn't have any control over that. I guess this changed their mind.

"MR. COLLINS: As a practical matter, the person doing the shooting is always charged until such time as they have a chance to determine what the facts are.

"THE COURT: That is incompetent. I will not permit you to ask the question.

"MR. PRICE: Very well, Your Honor." (Tr. 350-351, emphasis added.)

B. The Trial Court's Refusal to Permit Appellant to Inquire as to Butler's Interest in the Outcome of the Litigation Was Prejudicial Error.

This refusal constituted reversible error. Whether Butler would have answered affirmatively or negatively cannot now be known. In either event, however, appellant would have had an opportunity to develop, by full and further cross-examination here cut off in limine, the fact that Butler had a definite and real interest in the outcome of the litigation. If he had answered in the negative, his testimony would be biased by fear of such charge being made. If his answer was affirmative, appellant would have had a right to develop this fact fully to show Butler's interest in the outcome of this litigation. In either event, therefore, the error was prejudicial. However, the only showing in the record is that Butler was in fact charged (Tr. 350-351, supra), and not shown to be in custody.

The Supreme Court early ruled on the necessary scope to be afforded cross-examination in such circumstances.

In Alford v. United States, 282 U.S. 687 (1931), the Court reversed a conviction solely on the ground that counsel was not afforded the opportunity for such cross-examination.

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.
>
> * * *
>
> "The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution." (282 U.S. at 692-693, emphasis added, citations omitted.)

The court held that the trial judge had abused his discretion, and committed prejudicial error.

Similarly, see District of Columbia v. Clawans, 300 U.S. 617 (1937), where the Supreme Court held, affirming

the result of this court's decision at 66 App. D.C. 11, 84 F.2d 265 (1936):

> "The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error." (Id. at 632.)

In Alford, supra, the witness was actually in custody. However, possible interest or bias such as requires full and complete cross-examination, at pain of reversal, has been found in dismissal of charges against the witness at the instance of the prosecutor prosecuting the appellant, United States v. Masino, 275 F.2d 129 (2d Cir. 1960); expected immunity from not being charged, Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946); or mere hope of favorable treatment by the Government, Spaeth v. United States, 232 F.2d 776 (6th Cir. 1956).

Thus, any of the possible circumstances surrounding the fact that Butler was or was not charged, have been held such as to require full and complete cross-examination. Denial of such examination is prejudicial and reversible error, Alford, supra, at 692:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." (Emphasis added.)

It is immaterial whether the witness is involved in the same crime as that for which the accused is being tried, or a related or unrelated offense:

> "Nor is it material, as the Court of Appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention." (Alford, supra, 282 U.S. at 693, emphasis added.)

It is the motive, interest, or animus of the witness for testifying as he does that is critical. Villaroman v. United States, 87 App. D.C. 240, 184 F.2d 261 (1950), and see United States v. Masino, supra, 275 F.2d 129, 132 (2d Cir. 1960).

In this case, appellant was summarily deprived of his right to a full and complete cross-examination of Butler. The District Court's refusal constituted prejudicial error which can only be corrected by a new trial.

III. ALTHOUGH APPELLANT WAS INDICTED FOR ASSAULT WITH DANGEROUS WEAPONS, THERE WAS SOME EVIDENCE OF HIS COMMISSION OF MERELY A SIMPLE ASSAULT: THEREFORE, THE COURT'S REFUSAL TO PERMIT THE JURY TO FIND APPELLANT GUILTY OF THE LESSER INCLUDED OFFENSE WAS PREJUDICIAL ERROR.

A. The Submission to the Jury of the Issue of Lesser Included Offense is required if There is Some Evidence to Support it; Failure to Do So is Prejudicial Error.

Federal Rule of Criminal Procedure 31(c) permits the submission to the jury of offenses "necessarily included in the offense charged." However, the apparent permissiveness of this Rule and its common-law precedents was early modified by judicial decisions making the submission mandatory in a proper case. In Stevenson v. United States, 162 U.S. 313 (1896), the Court held that as there was some evidence of the commission of a lesser included offense, the issue must be given to the jury. The Court, resolving the issue whether a manslaughter charge was required in the trial of one charged with murder, stated:

> "The evidence as to . . . [the lesser included offense] need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine." 162 U.S. at 314 (Emphasis added).

The Supreme Court recently reaffirmed this proposition in Berra v. United States, 351 U.S. 131, 134 (1956), in interpreting present Rule 31(c):

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense."

The other United States Courts of Appeals have followed this rule; e.g., Larson v. United States, 296 F.2d 80 (10th Cir. 1961); as has the District of Columbia Circuit. In Young v. United States, ____ App. D.C. ____, 309 F.2d 662 (1962), the trial judge refused to charge the jury concerning the lesser included offense. The Court of Appeals, reversing, stated:

> "The evidence of a simple assault cannot be regarded as strong or convincing and perhaps the source could well be regarded as of dubious reliability, but the question of its weight and credibility was for the jury." ____ App. D.C. at ____, 309 F.2d at 663 (Emphasis added).

To be distinguished are cases applying the converse of the rule; i.e., where there is no evidence to support a finding of the lesser included offense, such an instruction is improper; MacIllrath v. United States, 88 App. D.C. 270, 188 F.2d 1009 (1951) (man shot in chest,

no evidence except of assault with gun/simple assault instruction not justified, especially when not requested), Burcham v. United States, 82 App. D.C. 283, 163 F.2d 761 (1947) (man stabbed with knife, no evidence of other assault/instruction on simple assault properly denied); and may, in the event of conviction of the lesser, be reversible error. Green v. United States, 95 App. D.C. 45, 218 F.2d 856 (1955); cf. Sparf v. United States, 156 U.S. 51, 63-64 (1895); and Coleman v. United States, 111 App. D.C. 210, 295 F.2d 555 (1961) (en banc), cert. denied, 369 U.S. 813 (1962). However, where there is some evidence to support the charge of the lesser included offense, the jury should receive an instruction on the lesser offense. Kitchen v. United States, 92 App. D.C. 382, 205 F.2d 720 (1953).

These complementary lines of authority are thus concomitant with the basic proposition announced in the Stevenson case, supra, and followed in this Circuit in Young, supra: the submission to the jury of the issue of lesser included offense is required if there is some evidence to support it. The weight of the evidence is for the jury to determine.

Where submission of the issue of the lesser included offense is thus required, it is the law in this Circuit that the error is prejudicial, requiring reversal, Young v. United States, ____ App. D.C. ____, 309 F.2d 662 (1962), as elsewhere. E.g., Larson v. United States, 296 F.2d 80 (10th Cir. 1961). As stated by the Supreme Court in Stevenson v. United States, supra, reversing a conviction for murder for failure to instruct on manslaughter:

> "A judge may be entirely satisfied from the whole evidence in the case that [the greater offense was committed] . . .; and yet if there be any evidence fairly tending to bear upon the issue of [the lesser offense] . . ., it is the province of the jury . . . to say whether the crime was [the greater or the lesser]." 162 U.S. at 323 (Emphasis added).

B. Simple Assault Is A Lesser Offense Necessarily Included In The Charge of Assault With A Dangerous Weapon.

The relationship which two offenses must bear to each other so that one is a lesser included offense as to the other is that the lesser must contain some, but not all, of the elements of the greater. Or as stated in Berra v. United States, 351 U.S. 131, 134 (1956): "[S]ome of the elements of the crime charged themselves constitute

a lesser crime . . . ." That simple assault is a lesser offense necessarily included in the offense of assault with a dangerous weapon is clear from the statutes themselves, which do not define the terms but merely state the greater in terms of the lesser, with the added requirement that an additional element be present: a "dangerous weapon." D.C. Code § 22-504, § 22-502 (1961). In MacIlrath v. United States, 88 App. D.C. 270, 188 F.2d 1009 (1951), the Court of Appeals recognized that assault with a dangerous weapon, without the employment of the dangerous weapon, is simple assault. See also Eagleston v. United States, 172 F.2d 194 (9th Cir. 1949), cert. denied, 336 U.S. 952 (1949).

C. The Evidence In This Case Required The Submission of The Issue of Simple Assault.

The prosecution's version of the case, taking the evidence in the light most favorable to it, was that appellant had been drinking at the Grill when Hicklin entered and sat down (Tr. 45); that appellant, without provocation, hit Hicklin in the head with a beer bottle, knocking him to the floor (Tr. 45-46); that appellant jabbed Hicklin with the remains of the bottle, which had

broken (Tr. 156), and hit him with a bar stool; and that Butler fired a warning shot, and then shot appellant in the side (Tr. 46-49).

Appellant, however, testified quite differently. He swore that Butler threatened him with a pistol, and that he tried to move out of Butler's line of fire. He testified that Butler fired, and that in his flight he might have collided with Hicklin at the door, and that he might have had the bottle in his hand. Then, he testified, Butler shot him.

> "I saw Mr. Butler go behind his counter. When he went behind his counter, he was shielded behind the cash register. He came up with his pistol. I looked at him momentarily when he came up with the pistol and he pointed it; and when he pointed it, he was behind the cash register on an angle. And he pointed the pistol, and I jumped off the stool at the time I saw the pistol. When I jumped off the stool, I spun around; and about that time Mr. Butler fired a shot. I didn't know who he was firing at or why he was firing when he fired the first shot. About this time I was going down the aisle. Then he fired the second shot, and he shot me in the back or in the side over here (indicating).
>
> * * *
>
> "BY MR. PRICE:
>
> "Q. At this time were you up by the door?

"A. I was by the door, because I was moving out of his way, out of the path of fire, out of the path of him and the gun from the time I saw it in his hand until the time I fell on the floor.

"Q. Did you still have a bottle of beer in your hand?

"A. I had the bottle of beer in my hand that I had just bought from Mrs. Smith that I was drinking.

* * *

"Q. Did you strike Mr. Hicklin as he was coming in the door?

"A. I don't remember striking Mr. Hicklin at all. The only way I could strike Mr. Hicklin was to collide with him at the time I was moving out of Mr. Butler's path of fire. I don't remember striking him at all.

"Q. Do you remember colliding with someone?

"A. I remember falling on the floor, trying to get up and couldn't get up, and I crawled out of the beer garden.

"Q. At the time you were going out the door, did you have the bottle in your right hand?

"A. I had the bottle in my hand when I got off the stool, because I was sitting there with the bottle.

"Q. All right. Now, do you remember colliding with anyone after you were shot as you were at the door?

"A. I don't remember colliding with anyone. I know I fell to the floor. I remember crawling and trying to get up and I couldn't get up and I started crawling.

"Q. Is it your best recollection that the only time you could have hit Mr. Hicklin was going out the door?

"A. That is the only time." (Tr. 206-208.)

Such "collision" at the door could be either intentional or accidental, and might or might not have been with a bottle. However, the ambiguity of appellant's testimony was resolved by that of another defense witness, Mr. James Morton, who testified thus on cross-examination by the prosecution:

"THE WITNESS: When I came in the beer garden, Williams and Butler was arguing.

"BY MR. COLLINS:

"Q. Did you hear what they were arguing about?

"A. Well, what they was saying wasn't no friendly words, what they were saying, I kept on to the back, to the back booth.

"Q. So there was an argument between the defendant and Butler?

"A. And Butler.

"Q. All right. Now, did that argument precede Butler's shooting the gun?

Did that come before he shot?

"A. That was before he shot.

* * *

"Q. Did you see a person named Charles Hicklin come in there?

"A. I seen him after the shot. That's when I stood up, when I heard it.

* * *

"THE COURT: Did you see Hicklin?

"THE WITNESS: Him and Isaac, they ran into each other or something, I don't know, I was in the last booth.

* * *

"Q. Well, you say 'ran into each other or something;' tell us about it.

"A. When I heard the shot, I stood up in the last booth. I seen Williams, Williams over there, Williams and the boy Charles [Hicklin] tussling.

* * *

"A. I seen him [Hicklin]. He was tussling.

"Q. You started to tell us about this 'or something.' What happened?

"A. The next thing I knew Butler shot Williams in the back.

"Q. Did you see the defendant Williams hit him with a beer bottle?

* * *

"THE WITNESS: I didn't see no beer bottle.

"BY MR. COLLINS:

"Q. You never saw a beer bottle in the defendant's hand?

"A. No, I didn't see no beer bottle.

"Q. Did you see broken glass on the floor in there?

"A. I didn't notice.

"THE COURT: What did you do when you saw all this? Did you stay in the back?

"THE WITNESS: No, sir, I left out.

"THE COURT: How did you get out?

"THE WITNESS: Through the front door." (Tr. 283-285.)

As he further explained on redirect examination by defense counsel:

> "Q. When you looked, you said, in answer to Mr. Collins' question, that you saw the defendant, Mr. Williams, run into Mr. Hicklin at the door?
>
> "A. Yes, sir.
>
> "Q. Is that what you are describing as a tussle?
>
> "A. Yes, that's right." (Tr. 289.)

Mr. Morton's testimony as to a "tussle," that Williams "ran into" Hicklin at the door, clearly introjected

the issue of simple assault into the case. The words do not connote simply an "accident," as admitted by counsel for the prosecution in a subsequent colloquy at the bench (Tr. 372). The Court recalled the testimony of appellant (Tr. 372) that he might have collided at the door with Hicklin, and agreed to instruct on accident (Tr. 373), which it did (Tr. 436-437). However, the Court failed to instruct on simple assault (Tr. 385, 427), although requested to do so.

The testimony of appellant as corroborated by that of Morton, put into issue the question of "collision" or "tussle" at the door, <u>without the presence of the beer bottle or the bar stool</u>. Moreover, the examining physician testified that Hicklin's wound was "not very severe," a single laceration (Tr. 326, 328). Clearly the jury could find that appellant intentionally struck Hicklin in order to get away from Butler's shots, and without the use of a beer bottle. Moreover, there was testimony that a bottle and a glass had been thrown on the floor earlier in the evening (Tr. 43). Further, Butler had admittedly fired a shot into his mirror (Tr. 46). There was, in short, a surplus of broken glass on the premises on that occasion from which Hicklin might have suffered a superficial head laceration if he fell as a result of such a "collision" or "tussle."

The Court itself recognized this possibility in instructing the jury on the issue of self-defense.

> "If this defendant was trying to escape from the range of the witness Butler, who fired the two shots, and in the process of trying to get out of the premises intentionally, without justification, intentionally struck the witness Hicklin, that would be not a defense." (Tr. 436.)

The evidence justifying this instruction required an instruction on simple assault. The evidence, set forth above, was sufficient. The test, as laid down by the Supreme Court in Stevenson v. United States, 162 U.S. 313, 314 (1896), is clear:

> "The evidence as to . . . [the lesser included offense] need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine." (Emphasis added.)

And as stated by this Court in Young v. United States, ____ App. D.C. ____, 309 F.2d 662, 663 (1962):

> "However implausible, unreliable or incredible only the jury had the right to make the evaluation of [the witness'] . . . testimony. The evidence of simple assault cannot be regarded as strong or convincing and perhaps the source could well be regarded as of dubious reliability, but the question of its weight and credibility was for

> the jury. . . . [W]ithout the critical instruction they would not be afforded the choice which was exclusively a jury choice."

So, here, the choice was for the jury. Denial of the opportunity to have the jury decide the question requires a new trial. Appellant's trial counsel so moved (J. A. 6-7), but the Court denied his motion (J. A. 7).

IV. THE TRIAL COURT'S FINAL INSTRUCTION TO THE JURY URGING THEM TO AGREE TO A UNANIMOUS VERDICT WAS PLAIN, PREJUDICIAL ERROR.

A. The Circumstances and Nature of the Charge

A conference was held in camera concerning the charge to be given the jury (Tr. 366). However, the issue of an "Allen"*/ charge was never discussed (Tr. 366-381), nor was it mentioned in the conferences at the bench prior to closing arguments of counsel (Tr. 384-387) and prior to instructing the jury (Tr. 427). The court gave its charge (Tr. 427-438), and then added:

> "I think, except for the final generalizations about the duties of the jurors that's all I have to say." (Tr. 438).

At this point various objections and requests were made at the bench and ruled on (Tr. 438-439). The court never mentioned an Allen charge, however.

At the end of this colloquy, the court instructed the jury on their duties. The charge began and ended thus:

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*/ Allen v. United States, 164 U.S. 492 (1896).

> "Ladies and gentlemen of the jury, your verdict must be unanimous."
>
> * * *
>
> "Listen to each other with a view to being convinced by what your fellow jurors have to say to the end that your verdict will be a unanimous verdict and a true verdict." (Tr. 439, emphasis added.)

The jury was forthwith given the case and excused (Tr. 439-441). They returned one hour and thirty-seven minutes later with a verdict of guilty (J. A. 6-7).

B. The Charge, As Given, Constituted Reversible Error

The so-called "Allen" or "dynamite" charge exhorting the jury to agree*/ is a dangerous one, at best, and there is small, if any, justification for its use. Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962). At least one State has forbidden its use altogether. State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959). It marks the limit to which a court may go in suggesting to the jury the desirability of agreement; it is saved from the realm of error only by its complementary reminder that jurors must not acquiesce in the majority's views or surrender their well-founded convictions. United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961).

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*/ The charge reads in part: "you should listen with a disposition to be convinced to each other's argument."

Its danger lies in its interference with the jury's function, Green v. United States, supra at 854. The interference results from the probability that, as stated by Haynsworth, J., in United States v. Rogers, supra at 435,

> "it might readily be construed by the minority of the jurors as coercive, suggesting to them that they should surrender their views in deference to the majority and concur in what really is a majority, rather than a unanimous, verdict." (Emphasis added.)

Thus, the pure Allen charge, where permitted, exhorts the jury to agree, but cautions them against surrendering their conscientious doubts, against abandoning their positions conscientiously held. The charge even in its pure form thus represents a delicate balance, and always hovers upon the brink of prejudicial error, to fall into the abyss if the delicate balance is even slightly disturbed.

If both of its elements -- exhortation and caution -- are given, but the exhortation to agreement is over-emphasized, the balance is disturbed, the charge is erroneous, and the conviction must be reversed. See, e.g., United States v. Smith, 303 F.2d 341 (4th Cir. 1962). In that case, the court over-emphasized

exhortation to agreement in giving an Allen-type charge:

> "I know that it is difficult when you have twelve men, all trying to come up with the proper answer to a question, to come into agreement, and it is sometimes hard for individuals to swallow their own views at that particular moment . . . ." (Emphasis supplied by the Court of Appeals) 303 F.2d at 342-43.

The Court of Appeals reversed: "The Allen charge is quite bold enough, and in our opinion these further words did not simply guide the jury but inclined their deliberation." Id. at 343.

Similarly, in Green v. United States, 309 F.2d 852 (5th Cir. 1962), the spur to agreement was over-emphasized:

> "[I]t is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority . . .." Id. at 853.

The judgment was reversed. The Court of Appeals held this transgressed the outermost permissible limit of the Allen charge's exhortation element, that the jury "should listen, with a disposition to be convinced, to each other's arguments." Id. at 854. Similarly, Powell v. United

States, 297 F.2d 318 (5th Cir. 1961), reversed the judgment reached after a charge which, though three times reminding the jurors of their duty to follow their convictions, charged it to be improper for a juror to stand out in a spirit of stubbornness.

However, when the exhortation to agreement is given, as here, without the cautions against abandonment of conscientious views and positions, the fine balance of the Allen charge becomes completely unhinged. The sole saving feature which ever makes it permissible is absent. Thus held the court in Rhodes v. United States, 282 F.2d 59 (4th Cir. 1960). It is

> "imperative . . . in a criminal prosecution to insist that each juror must be conscientiously convinced of guilt, and that if after giving deferential consideration to the opinions of his fellow jurors, he remains unconvinced, he should not join in a verdict merely because he finds himself in minority. The verdict must be the unanimous judgment of twelve jurors." (Id. at 62-3, emphasis added.)

Most precisely in point is United States v. Rogers, 289 F.2d 433 (4th Cir. 1961). There, the trial judge gave the jury a supplementary charge on its duty to agree if possible, adding:

> "Now I do not want you to understand by what I say that you are going to be made to agree or that you are going to be kept out until you do agree." (Id. at 434, n.2.)

However, the judge, as here, failed to add "the ameliorating admonition that no juror should yield his conscientious conviction." (Id. at 434.) Said the court per Haynsworth, J., reversing:

> "If . . . slight additions to the Allen charge . . . converts an otherwise proper and appropriate charge into one that is prejudicial and erroneous, how much more objectionable it is if the reminder that makes the Allen charge tolerable in the first place is omitted altogether. Here what was given was not the Allen charge, but only a paraphrase of that portion of it which directs the attention of the jurors to their duty to agree, without the reminder of their duty of dissent if dissent is founded upon reasoned conclusions reasonably arrived at and reasonably held.
>
> * * *
>
> "When the moderating condition which makes the direction to re-examine their views permissible . . . is omitted, then the direction becomes so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand." (Id. at 436-437, emphasis added.)

So, here, the paraphrase of the directive element of the Allen charge was given, without the ameliorating condition which makes it tolerable in any case; the charge is "so likely to be coercive, that a verdict rendered promptly thereafter should not be allowed to stand." (Ibid.)

The Rogers case is controlling here, notwithstanding the fact that there the charge was given after the jury had retired, whereas here it was given before. On the contrary, this case is stronger. Deadlock, as in Rogers, might justify such a charge. However, an instruction before retiring, given in such a manner as to be the last word the jury heard, cannot be justified. The instruction in Green, supra, was given prior to the jury's retirement. The court held that the prejudicial nature of the instruction was not affected by the time it was given.*/ The court's words here were the last the jury heard. Their effect was unquestionable, and incalculable. As stated by the Supreme Court in Bollenbach v. United States, 326 U.S. 607, 612 (1946):

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*/ 309 F.2d at 856.

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

Prejudicial error, requiring reversal, was committed.

C. The Court's Charge Was Plain Error Affecting Substantial Rights Which May Be Noticed By This Court.

The absence of an objection to this charge is understandable. It came after the requested instructions had been given, and objections and requests heard (Tr. 438-439). It was given after the court had virtually told counsel it was finished with its instructions. As soon as it was finished, the jury was given the case, and the jury retired (Tr. 439-440).

This Court has the power, under Fed. R. Crim. P. 52(b), to notice plain errors or defects not brought to the attention of the trial court, even where appellant has failed to object to an instruction as ostensibly required by Fed. R. Crim. P. 30. The Supreme Court has held, in a case involving prejudicial influence upon the jury by the trial court, that exception was not necessary:

> "This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by

> modification of the judge's charge after the harm has been done." Brasfield v. United States, 272 U.S. 448, 450 (1926).

Similarly, after the adoption of the Rules, it has been persuasively argued that a prejudicial Allen-type charge should be noticed without the necessity of objection. Brown, J., dissenting, in Huffman v. United States, 297 F.2d 754, 756 (5th Cir. 1962), states:

> "If there ever were a place for the plain error rule of F. R. Crim. P. 52, this should be it. This is the Judge speaking. He is speaking not on the substantive merits of the case. He is speaking about developments subsequent to submission of the cause. He alone has determined that the time has come for an admonition to the jury. When it is done, it is too late to undo it. Nothing, absolutely nothing, he may say can really correct this if (a) the time was inopportune or (b) the content or method of supplemental instruction is significantly faulty. Consequently, this ought to be viewed just as though counsel, instead of acquiescing, had gone through the formality of excepting."

Both authorities clearly point out the futility of objection. The damage, as here, is irreparable. The only remedy is a new trial. Surely it would be archaic formalism for the Court of Appeals of this Circuit to hold that the rights of an appellant convicted under an Allen charge depend upon trial counsel's vocalization of

the two words, "I except," when no objection or exception, nor any ruling thereon, can cure the defect. Appellant's trial counsel apprised the court of the error in the only effective way possible; by his motion for a new trial (J. A. 7-8).

V. CONCLUSION

For the foregoing reasons, appellant submits that the judgment of conviction should be reversed.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT ISAAC WILLIAMS

In The

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For the District of Columbia Circuit

ISAAC WILLIAMS,
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v. No. 17,964

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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INDEX

ARGUMENT

I. THE REFUSAL TO ORDER PRODUCTION OF THE WITNESS HICKLIN'S GRAND JURY TESTIMONY WAS PREJUDICIAL ERROR..... 1

II. THE DENIAL OF CROSS-EXAMINATION AS TO WHETHER THE WITNESS BUTLER WAS CRIMINALLY CHARGED WAS PREJUDICIAL ERROR..... 6

III. THE DENIAL OF THE INSTRUCTION ON THE LESSER INCLUDED OFFENSE WAS ERRONEOUS AS THERE WAS SOME EVIDENCE TO SUPPORT IT..... 10

IV. THE TRIAL COURT'S PREMATURE "DYNAMITE" CHARGE CONSTITUTED REVERSIBLE ERROR..... 13

A. The Charge Was Coercive..... 13

B. The Charge Is Equally Coercive Whether Given Initially or After Deadlock..... 15

C. The Plain Error Rule Should Be Applied Here..... 18

V. CONCLUSION..... 21

TABLE OF CITATIONS

Cases:	Page
Alford v. United States, 282 U.S. 687 (1931)	7, 8
*Allen v. United States, 164 U.S. 492 (1896)	14, 15
*Andres v. United States, 333 U.S. 740 (1948)	16
Bayless v. United States, 200 F.2d 113 (9th Cir. 1952), cert. denied, 345 U.S. 929 (1953)	7
*Bord v. United States, 76 U.S. App. D.C. 205, 133 F.2d 313 (1942), cert. denied, 317 U.S. 671 (1942)	14, 19
*Brasfield v. United States, 272 U.S. 448 (1926)	20
*Campbell v. United States, No. 17,185 (March 21, 1963)	13, 17
*DeBinder v. United States, 110 U.S. App. D.C. 244, 292 F.2d 737 (1961)	3
Dennis v. United States, 302 F.2d 5(10th Cir. 1962)	3
*District of Columbia v. Clawans, 300 U.S. 617 (1937)	8
Dukes v. United States, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960) . . .	18
Green v. United States, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955)	10
*Green v. United States, 309 F.2d 852 (5th Cir. 1962)	13, 16, 17

*/ Cases principally relied upon.

Cases: Page

Hance v. United States, 299 F.2d 389 (8th Cir. 1962) 3

Hansborough v. United States, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962) 10

*Harrell v. United States, ___ U.S. App. D.C. ___, 317 F.2d 580 (1963) . . 3

*Hoagland v. Chestnut Farms Dairy, Inc., 63 App. D.C. 357, 72 F.2d 729 (1934) . . . 13

Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960) 15

*Huffman v. United States, 297 F.2d 754 (5th Cir. 1962) 16, 19

Janko v. United States, 281 F.2d 156 (8th Cir. 1960), reversed on other grounds, 366 U.S. 716 (1961) . . . 15, 17

*Jones v. United States, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962) . . . 18, 19

*McKenzie v. United States, 75 U.S. App. D.C. 270, 126 F.2d 533 (1942) . . . 18, 20

Moore v. United States, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958) . . . 19

Myres v. United States, 174 F.2d 329 (8th Cir. 1949), cert. denied, 338 U.S. 849 (1949) 7

Nick v. United States, 122 F.2d 660 (8th Cir. 1941), cert. denied, 314 U.S. 687 (1941) 15, 17

*/ Cases principally relied upon.

Cases:	Page
Papadakis v. United States, 208 F.2d 945 (9th Cir. 1953)	14
*Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 632 (1957) . . .	18
*Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959)	2, 3
*Payton v. United States, 96 U.S. App. D.C. 1,222 F.2d 794 (1955)	18
*Ruffin v. United States, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), cert. denied, 361 U.S. 865 (1959)	19
*Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946)	6
*Simmons v. United States, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962) . . .	2, 3, 4
*Stevenson v. United States, 162 U.S. 313 (1896)	10, 12
*United States v. Furlong, 194 F.2d 1 (7th Cir. 1952)	19
United States v. Gordon, 196 F.2d 886 (7th Cir. 1952)	14
*Villaroman v. United States, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950)	7
Statutes and Rules:	
Fed. R. Crim. P. 52(b)	18

*/ Cases principally relied upon.

ARGUMENT

I. THE REFUSAL TO ORDER PRODUCTION OF THE WITNESS HICKLIN'S GRAND JURY TESTIMONY WAS PREJUDICIAL ERROR

Hicklin, the alleged recipient of the assault charged, like many of the witnesses, was not overly precise in his speech. However, he was clear about one thing: that when he had testified before the grand jury, he said he was hit immediately upon entering the door. He attempted to deny this testimony at the trial, but was forced to admit it. (Tr. 199-201.) The trial judge, though seasonably apprised of the inconsistency, refused to order production of the grand jury testimony and compounded the error by resolving the apparent inconsistency in the hearing of the jury:

> "THE COURT: He has told you what just as soon as he got in the door meant. He just told you on this recall, and he told you on the original cross examination." (Tr. 200.)

The policy of secrecy of grand jury deliberations is no broader than the reasons underlying it.

> "Essentially four reasons have been advanced as justification for grand jury secrecy. (1) To prevent the accused from escaping before he is indicted and arrested or from tampering with the

> witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings." Brennan, J., dissenting in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (footnotes omitted). Accord, Simmons v. United States, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962).

Here, none of the reasons advanced in support of the policy are applicable to the extent disclosure was sought here. The accused (1) was in custody and (2) had been indicted. (3) The witness whose grand jury testimony was sought had already testified. (4) No disclosure of deliberation of grand jurors was sought. The policy of secrecy, therefore, should not be made into sacrosanct dogma as urged by the Government, especially in view of the particularized need shown here. This court has not yet done so, and should not do so now.

The Pittsburgh Plate Glass case's requirement of particularized need was not met in that case -- the petitioner had merely shown prior testimony of the witness on the same subject matter before the grand jury as at the trial. Here, certainly probable inconsistency was shown, evidenced by the fact that the court itself interrupted counsel to resolve it. (Tr. 200.) The decisions in this court have not required as much; certainly no more should be required now. The Government cites a Tenth Circuit case in its brief for the proposition that particularized need must be shown for in camera inspection.[1/] However, the views are not those of this court. Simmons v. United States, supra. Under the circumstances here, the discretion of the district judge was abused. DeBinder v. United States, 110 U.S. App. D.C. 244, 292 F.2d 737 (1961); Harrell v. United States, _____U.S. App. D.C._____, 317 F.2d 580 (1963), and other cases cited in Brief for Appellant at 16-17. When particularized need is shown and production denied, prejudice results. See Hance v. United States, 299 F.2d 389, 398 (8th Cir. 1962).

1/ Dennis v. United States, 302 F.2d 5 (10th Cir. 1962).

The Government suggests that the witness Hicklin was not an important one because he was not particularly helpful to the prosecution's case. However, Hicklin's grand jury testimony, if produced, would have been crucial to the appellant's case: if he admitted what he did on cross-examination without the use of the grand jury testimony, he surely would have admitted more on confrontation with it. Had he admitted he previously testified that he was hit immediately, this would have confirmed Morton's testimony which, if credited, would support a finding of simple assault. The importance of the testimony of a witness is a relative matter and the subjective effect upon a jury of possible differences in the testimony of a particular witness is difficult to assess. Accordingly, this Circuit has wisely resolved doubts in favor of the accused, whose guilt must be proven beyond a reasonable doubt, and held that the witness need be but an "important" one. Simmons v. United States, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962). Clearly here, the one Government witness who had no clear interest

in the outcome of the case,[2/] who was the alleged victim of the purported assault, and whose testimony would thus be given and entitled to singular weight, was important.

2/ The others were the bartender with the gun, his waitress, and his alleged mistress and proven regular female companion.

II. THE DENIAL OF CROSS-EXAMINATION AS TO WHETHER THE WITNESS BUTLER WAS CRIMINALLY CHARGED WAS PREJUDICIAL ERROR

> "Full and complete cross-examination of important witnesses as to interest or bias is necessary. As the Supreme Court stated in Alford v. United States, 282 U.S. 687, 692 (1931): "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

Expected immunity from prosecution constitutes such interest. Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946). The Government seeks to avoid the issue by its first contention, that the initial inquiry, as to whether Butler (the bartender with the gun) was aware that he would be subject to a criminal charge if he shot appellant without justification, merely called for a conclusion of law. The conclusion of law -- i.e., guilt or innocence -- was not sought; rather, the state of the witness' mind was itself clearly the ultimate fact sought to be established.

The fear of reprisal or hope of favor was itself the probandum not the ultimate question of guilt

or innocence. It is the motive, interest, or animus of the witness for testifying as he does that is critical. Villaroman v. United States, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). The Government's contention, which actually goes to materiality, is thus without merit.

Moreover, the cases relied upon by the Government to support this contention are not in point. Bayless v. United States, 200 F.2d 113 (9th Cir. 1952), cert. denied, 345 U.S. 929 (1953) and Myres v. United States, 174 F.2d 329 (8th Cir. 1949), cert. denied, 338 U.S. 849 (1949). In both, the ultimate probandum was irrelevant to the case. In Bayless, it was "frivolous";[3/] in Myres, no foundation had been laid. Here, the fact to be proved was the state of the witness' mind, an independent relevant probandum, Villaroman v. United States, supra, and Alford v. United States, supra.

The Government's second contention, that the questions sought to be asked Butler on rebuttal as to whether he was in fact charged, were irrelevant to the

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3/ 200 F.2d at 115.

guilt or innocence of appellant, is frivolous. The bias of a witness is always material, and the possible pressures bearing on a witness which might influence his testimony are relevant to that fact. Paramount among these are charge of crime, or withdrawal or suspension of charges, by the authorities prosecuting the defendant.[4/]

Nor was this an attempt by appellant to impeach Butler on the basis of prior criminal conduct. The testimony sought in both instances was clearly relevant to the obvious purpose for which it was attempted to be elicited, and is not inadmissible because irrelevant to other issues. Alford, supra. Under such circumstances, the cross-examination was a matter of right.[5/] As stated by the Supreme Court in District of Columbia v. Clawans 300 U.S. 617, (1937):

> "[T]he prevention, throughout the trial of a criminal case, of all inquiry in

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4/ Appellant's argument on this point will not be repeated here. See Appellant's Main Brief at 23-27.

5/ The Government infers, without referring to the Transcript, that the witness Butler was extensively

fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error." 6/

5/ (cont'd) cross-examined as to bias and interest. At no time did the court permit inquiry into whether Butler was charged with a crime.

6/ 300 U.S. a6 632.

III. THE DENIAL OF THE INSTRUCTION ON THE LESSER INCLUDED OFFENSE WAS ERRONEOUS AS THERE WAS SOME EVIDENCE TO SUPPORT IT

If there is some evidence upon the lesser included offense, an instruction is required on the issue by virtue of the right of an accused to trial by jury. Stevenson v. United States, 162 U.S. 313 (1896). If there is no such evidence, such an instruction is improper. Hansborough v. United States, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962); Green v. United States, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955).

In the present case, however, there was evidence which would support a finding of guilty of simple assault. Such an instruction was therefore required. Concededly, the Government's case, as developed through the testimony of the bartender with the gun, his employee, his female companion, and the injured witness who changed his testimony, does not indicate simple assault.

The appellant, with a bullet in his side, though he remembered little, did remember that the only possible physical contact with Hicklin would have been at the door. [Tr. 206-08.]

The witness Morton, as was the case with the other witnesses in this proceeding, had some difficulty expressing himself. Nevertheless, he did testify relatively clearly, first, as follows:

"THE COURT: Did you see Hicklin?

"THE WITNESS: Him and Isaac, they ran into each other or something, I don't know, I was in the last booth.

* * *

"Q. Well, you say 'ran into each other or something;' tell us about it.

"A. When I heard the shot, I stood up in the last booth. I seen Williams, Williams over there, Williams and the boy Charles [Hicklin] tussling.

* * *

"A. I seen him [Hicklin]. He was tussling. (Tr. 284-5, emphasis added.)

Thus, Morton explained what he meant by "running into" the injured witness, for Government counsel. When asked again by defense counsel, he obligingly reversed the equation:

"Q. When you looked, you said, in answer to Mr. Collins' question, that you saw the defendant, Mr. Williams, run into Mr. Hicklin at the door?

"A. Yes, sir.

"Q. Is that what you are describing as a tussle?

"A. Yes, that's right." (Tr. 289.)

A "tussle" is clearly an intentional act,7/ and especially when Morton testified that Hicklin was "tussling" also. As for "running into each other", this might be either intentional or accidental; a collision or a body block. If the phrase is ambiguous, however, the ambiguity is resolved by the equation of the phrase with "tussle", an intentional act. It is thus very clear that what was described -- be it "tussle" or "run[ning] into . . . Hicklin", could be found by the jury to be more than accident. A jury question was presented; and an instruction was required. "[I]f there be any evidence fairly tending to bear upon the issue", it is for the jury to determine. Stevenson v. United States, 162 U.S. 313, 323 (1896) (Emphasis added).

7/ "A struggle, scuffle" Webster's New International Dictionary 2220 (1913).

IV. THE TRIAL COURT'S PREMATURE "DYNAMITE" CHARGE CONSTITUTED REVERSIBLE ERROR

A. The Charge Was Coercive

Under rulings of this Court on the several occasions on which it has been invited to consider the "Allen" or "dynamite" charge, the district court's "final generalizations" [Tr. 438] to the jury were reversible error. In the recent case of Campbell v. United States, D.C. Cir. No. 17,185 (March 21, 1963), this Court admonished the district court that the Allen charge should be given sparingly, if ever. It approved the critical view advanced in Green v. United States, 309 F.2d 852 (5th Cir. 1962), relied upon by appellant and discussed in its main brief at 42-47.

If the jurymen are to be encouraged to agree, they must at the same time be cautioned not to yield their individual conscientious positions. In Hoagland v. Chestnut Farms Dairy, Inc., 63 App. D.C. 357, 72 F.2d 729 (1934), the jury had reported deadlock and the trial judge gave a supplemental charge. The charge encouraged the jurors to agree, but

> "[a]t the same time, the court said, 'None of you should return a verdict against your conscientious views', and also, 'I think if you can conscientiously get together you should do so.'" (63 App. D.C. at 360, emphasis added.)

This Court held this proper, and affirmed, relying on Allen v. United States, 164 U.S. 492, 501 (1896). As in Allen, both the encouraging and cautionary elements were given as part of the charge.[8/] In Bord v. United States, 76 U.S. App. D.C. 205, 133 F.2d 313 (1942), cert. denied, 317 U.S. 671 (1942), this court had also ruled on an Allen charge. There the trial judge recalled the jury and cautioned the jurors not to be "unreasonable," "bull-headed," or "stubborn." This court affirmed, observing that the trial judge had cautioned the jurors not to yield their conscientious position, as follows:

8/ The charges found proper in the cases relied upon by the Government also contained both these elements. United States v. Gordon, 196 F.2d 886, 892 (7th Cir. 1952), reversed on other grounds, Gordon v. United States, 344 U.S. 414 (1952). ("[W]e should observe that the Supreme Court, in the Allen case, fixed the extreme limits beyond which a trial court should not venture, in advising the jury as to its duty to attempt to agree."); Papadakis v. United States, 208 F.2d 945 (9th Cir. 1953) (encouraged conscientious agreement, jurors to abandon individual views only when convinced

> "'If, on the other hand, he does have an abiding conviction one way or the other it is not his duty to surrender to a majority the other way.' The charge ended with a cordial expression of appreciation to the jury. Though the language to which appellant objects is strong, we think the context prevented it from being coercive." (76 U.S. App. D.C. at 207.)

In no case found has a charge as strong as the one in this case been brought before this Court; in each case the outer limits of the charge set forth in the Allen case had not been transgressed. Both elements -- the exhortative and the cautionary -- had been given in equal balance. Here, however, the balance was destroyed.

B. The Charge Is Equally Coercive Whether Given Initially or After Deadlock

As a matter of reason and logic, a charge minimizing the duty of individual jurymen to hold their conscientious views and emphasizing the collective duty

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8/ (cont'd)
erroneous); Janko v. United States, 281 F.2d 156 (8th Cir. 1960, reversed on other grounds, 366 U.S. 716 (1961); and apparently Nick v. United States, 122 F.2d 660 (8th Cir. 1941), cert. denied, 314 U.S. 687 (1941). The charge in Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960) is not reported.

to agree to a unanimous verdict is equally destructive of defendant's right to a mistrial whether given initially as part of the original charge, or subsequently after a majority and a minority have already been formed. It cannot be supposed that a jury or its individual members forget their original instructions in toto so that when disagreement results a coercive original charge has no effect on the then minority.

A jury trial has not two but three possible wholly proper outcomes: a unanimous verdict of acquittal, a unanimous verdict of conviction, or a disagreement. As stated by Brown, J., dissenting in Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962):

> "I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise." (Emphasis added.)

Jury disagreement and judicial declaration of a mistrial thus safeguards the Constitutional right of the accused not to be convicted by a majority, rather than a unanimous, verdict. See Andres v. United States, 333 U.S. 740 (1948).

That this right of an accused to a mistrial is equally infringed whether coercion is applied before the jurymen retire or after deadlock is reached is borne out by the only case found which considered the question in the light of this right.[9/] In Green v. United States, 309 F.2d 852, 856 (5th Cir. 1962), the court held the time of the charge immaterial:

> "In this case the dynamite exploded before there was any reason to think that blasting was necessary: the trial judge gave the charge before the jury retired. . . . The vice in the charge was the court's interference with the jury function. No matter when the charge was made . . . it prejudiced the right of an accused to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors." (Emphasis added.)

It is the tendency, not the necessary result; the intent, not the effect; that is controlling. The charge is "intended to 'encourage' jurors to agree." Campbell, supra at 2.

9/ The cases relied upon by the Government in this connection are not persuasive, not only because they fail to consider the tendency of a coercive charge to deprive an accused of his right to a mistrial, but because the charges there considered were not viewed as coercive by the reviewing court. Janko v. United States, 281 F.2d 156 (8th Cir. 1960), reversed on other grounds, 366 U.S. 716 (1961); Nick v. United States, 122 F.2d 660 (8th Cir. 1941), cert. denied, 314 U.S. 687 (1941).

C. The Plain Error Rule Should Be Applied Here

When reversible error is committed, the "plain error" rule[10] provides the appellate court a remedy. This Court has applied it freely, recognizing that basic rights of an accused should not be held waived by momentary inadvertance of trial counsel.[11] This policy is especially applicable where, as here, the case is apparently over, counsel's objections to instructions have been invited, heard and ruled on, and all that remains are final generalizations as to the duty of jurors. [Tr. 438.]

This court has ruled that instructions not requested at trial may not be demanded for the first time on appeal, as the Government's Brief points out,[12]

10/ Fed. R. Crim. P. 52(b).

11/ E.g., Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 632 (1957) (admission of hearsay evidence without objection, reversed); Payton v. United States, 96 U.S. App. D.C. 1, 222 F.2d 794 (1955) (multiple errors not objected to, reversed); McKenzie v. United States, 75 U.S. App. D.C. 270, 126 F.2d 533 (1942) (erroneous charge to jury, no objection, reversed).

12/ E.g., Jones v. United States, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962) (instruction on identification not requested; Bastian, J., dissenting); Dukes v. United States, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960) (special verdict, not requested; Fahy, J., dissenting).

as have other courts, as urged by the Government.[13/]

However, where an erroneous charge is given on the court's own initiative, which goes to the essence of the jury's function, the courts have examined the error urged, and decided it on its merits, Bord v. United States, supra. Thus, this Court in Jones v. United States, supra, found the charge not erroneous, nor was it held erroneous in Ruffin v. United States, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), cert. denied, 361 U.S. 865 (1959), both relied on by the Government. Nor have other courts refused to examine with care the error urged. E.g., United States v. Furlong, 194 F.2d 1 (7th Cir. 1952), also urged by the Government.[14/] Where reversible error is found after such an examination, the reviewing court should not -- as indeed this court

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13/ E.g., Moore v. United States, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958).

14/ Huffman v. United States, 297 F.2d 754 (5th Cir. (1962), relied on by the Government, cannot be said authority for blanket refusal to apply "plain error" rule to an Allen charge, for there the trial court did warn the jurors against surrendering a position conscientiously held, which the reviewing court evidently viewed as saving the charge from reversible error.

has not -- refuse to apply the plain error rule. McKenzie v. United States, 75 U.S. App. D.C. 270, 126 F.2d 533 (1942). Cf. Brasfield v. United States, 272 U.S. 448, 450 (1926). Especially is this the case where, as here, the error cannot be effectively remedied by modification of the charge after the harm has been done.

V. CONCLUSION

Appellant submits that the judgment of conviction should be reversed.

Respectfully submitted,

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41 7

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,964

ISAAC WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The District of Columbia

---

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United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
B. MICHAEL RAUH,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Whether the trial court abused its discretion in denying the defense request for production of the complainant's Grand Jury testimony, where said witness was not the sole or principle witness for the prosecution and was extensively cross-examined regarding the alleged inconsistency.

2. Whether it was error for the trial court to prohibit appellant's counsel from cross-examining a government witness, where the questions called for a legal conclusion by a lay person and where the questions were irrelevant to the factual issues to be determined by the jury.

3. Whether it was error for the trial court to refuse to give a simple assault instruction, where no evidence supported such an offense.

4. Whether the trial court erred in telling the jury, in the primary instructions, that their deliberations should be orderly and that they should discuss the facts among themselves with a view to returning a unanimous verdict, where no objection was made.

INDEX

	Page
Counterstatement of the Case	1
Statutes and Rules Involved	4
Summary of Argument	6
Argument:	
I. The District Court's Refusal to Order Production of the Grand Jury Transcript was Proper	7
II. The District Court Correctly Prohibited Irrelevant and Improper Cross-Examination of Witness Butler	9
III. The District Court's Refusal to Instruct on Simple Assault was Correct	11
IV. The District Court's "Final Generalization" to the Jury were Proper	13
Conclusion	16

TABLE OF CASES

**Allen* v. *United States*, 164 U.S. 492 (1896)	14, 15
Bayless v. *United States*, 200 F.2d 113 (9th Cir. 1952), *cert. denied*, 345 U.S. 929	9
Beasley v. *United States*, 94 U.S. App. D.C. 406, 218 F.2d 366 (1954), *cert. denied*, 349 U.S. 907	10
**Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947)	11
Campbell v. *United States*, No. 17,185, decided March 21, 1963	15
Carey v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961)	14
**DeBinder* v. *United States*, 110 U.S. App. D.C. 244, 292 F.2d 737 (1961)	8
Dennis v. *United States*, 302 F.2d 5 (10th Cir. 1962)	8
Dukes v. *United States*, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960)	13
Gordan v. *United States*, 112 U.S. App. D.C. 33, 299 F.2d 117 (1962)	8
Guthrie v. *United States*, 92 U.S. App. D.C. 361, 207 F.2d 19 (1953)	10
Hance v. *United States*, 299 F.2d 389 (8th Cir. 1962)	9
Hansborough v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962)	11

Cases—Continued

	Page
Harrell v. *United States*, ... U.S. App. D.C. ....., 317 F.2d 580 (1963)	8
**Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960)	15
Huffman v. *United States*, 297 F.2d 754 (5th Cir. 1962)	13
Jackson v. *United States*, 111 U.S. App. D.C. 353, 297 F.2d 195 (1961)	8
Janko v. *United States*, 281 F.2d 156 (8th Cir. 1960), *reversed other grounds*, 366 U.S. 716	15
Jones v. *United States*, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962)	13
**MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951)	11
Moore v. *United States*, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958)	13
Myres v. *United States*, 174 F.2d 329 (8th Cir. 1949), *cert. denied*, 338 U.S. 849	10
Nick v. *United States*, 122 F.2d 660 (8th Cir. 1941), *cert. denied*, 314 U.S. 687	15
Papadakis v. *United States*, 208 F.2d 945 (9th Cir.1953)	15
**Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), *rehearing denied*, 361 U.S. 855	6, 7
Powell v. *Alabama*, 287 U.S. 45 (1932)	10
Ruffin v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), *cert. denied*, 361 U.S. 865	13
Simmons v. *United States*, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962)	8, 9
**Simms* v. *United States*, 101 U.S. App. D.C. 304, 248 F.2d 626 (1957), *cert. denied*, 355 U.S. 875	10
Sparf and Hansen v. *United States*, 156 U.S. 51 (1895)	12
**Stevenson* v. *United States*, 162 U.S. 313 (1896)	11
Taylor v. *United States*, No. 17,737, decided July 25, 1693	10
United States v. *Gordon*, 196 F.2d 886 (7th Cir. 1952)	14
United States v. *Furlong*, 194 F.2d 1 (7th Cir. 1952)	13
United States v. *Tellier*, 255 F.2d 441 (2d Cir. 1958)	15

* Cases or authorities chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,964

ISAAC WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment filed in the District Court on April 5, 1963, with violation of 22 D.C. Code 502 (assault with a dangerous weapon) (J.A. 4). Upon a plea of not guilty (J.A. 5), and trial by jury, a verdict of guilty as indicted was entered (J.A. 6, Tr. 440, 441). Appellant's motion for new trial, filed May 23, 1963, was denied by the trial judge (J.A. 7, 8) and by judgment and commitment filed June 18, 1963, appellant was sentenced to imprisonment for a period of two to six years (J.A. 9). The instant appeal followed.

The evidence adduced at trial supports the jury verdict that the appellant without provocation assaulted Charles

R. Hicklin with a beer bottle and bar stool at the Starlight Grill, located at 436 L. Street, Northwest, Washington, D. C. about 11:00 p.m. on February 9, 1963. Mr. Hicklin testified that he entered the grill around 10:50 or 10:55 p.m., looked around, sat on a stool at the bar, was struck across the head with a bottle (Tr. 15, 36, 199) and "that is the last thing I remember" (Tr. 13). The next thing Hicklin recalled was being at the Washington Hospital Center with a stab cut over the left temple which required stitching (Tr. 15).

The manager and bartender of the Starlight Grill, Roy Thomas Butler, testified that appellant first came in the bar around five o'clock on the evening of February 9, 1963, and that periodically he would leave and return (Tr. 39, 41). During the evening appellant went back into the kitchen where he annoyed the waitress (Tr. 42, 94), poured a glass of beer on the floor, broke a bottle on the floor, cursed the witness (Tr. 45, 93, 95), acted in a boisterous manner (Tr. 83, 86, 154) and struck a female patron (Tr. 44, 86, 95). Because of his unruly conduct appellant was asked to leave the restaurant (Tr. 43, 83, 86, 154). Close to eleven o'clock Mr. Hicklin entered the Grill and took a seat at the bar (Tr. 45, 63). Whereupon, and without provocation or reason, appellant picked up a bottle of beer from a table across the room (Tr. 64) and struck Hicklin on the left side of the head, knocking him off the stool (Tr. 45, 46, 65). Appellant then, picked up a heavy metal bar stool (Tr. 69, 70) and smashed the unconscious victim in the face; whereupon Butler fired a warning shot with a pistol he kept under the cash register (Tr. 46, 72). As appellant was about to render another blow with the bar stool, Butler shot Williams in the side to prevent further injury to the complainant (Tr. 47, 70). A waitress, at the request of Butler, called the police, who arrived shortly thereafter and found the bloody complainant on the floor of the Grill and appellant lying on the sidewalk (Tr. 50, 182, 356). Mrs. Pauline Smith, a waitress in the Grill (Tr. 90) and Miss

Elaine Mitchell, a patron (Tr. 151) corroborated the testimony as given by Butler (Tr. 97-101, 155-157).

Officer Manfredi responding to the scene was the first policeman to arrive at the Starlight Grill and there found the appellant lying on the sidewalk (Tr. 182). Mr. Hicklin was inside the restaurant lying, in a semiconscious state, on the floor adjacent to the bar (Tr. 182). Hicklin was bleeding from the left side of his head and beside his body was broken glass from a beer bottle (Tr. 187). An ambulance was requested to transport appellant and Hicklin to a hospital, but "when the ambulance arrived, Isaac Williams started to fight the policemen who were trying to assist him" (Tr. 183). Both injured men were then taken to a hospital for treatment (Tr. 187).

The appellant, who at the time was unemployed, testified that he was in the bar on the night in question, killing time by having a few drinks with some friends (Tr. 202, 212, 237). He denied disturbing the waitress or striking a lady customer (Tr. 202, 204). He stated that he was sitting at the bar when Butler went behind the counter and "he came up with his pistol. I looked at him momentarily * * * and he pointed the pistol, and I jumped off the stool at the time I saw the pistol. When I jumped off the stool, I spun around; and about that time Mr. Butler fired a shot. I don't know who he was firing at * * *. About this time I was going down the aisle. Then he fired the second shot, and he shot me in the back or in the side * * *. I was by the door because I was moving out of his way, out of the path of fire * * *. I had the bottle of beer in my hand * * *. I don't remember striking Mr. Hicklin at all. The only way I could strike Mr. Hicklin was to collide with him at the time I was moving out of Mr. Butler's path of fire. I don't remember striking him at all." (Tr. 206-208.) Appellant admitted to being convicted of petit larceny and simple assault (Tr. 255).

James Morton, a frequent patron in the Grill (Tr. 273), testified that he was present on February 9, 1963 and from the back of the room heard an argument between

the appellant and Butler (Tr. 282). The argument preceded Butler's firing the gun and upon hearing the shot, Morton stood up. He saw appellant and Mr. Hicklin run "into each other." (Tr. 284.) Edward Howard, the appellant's brother-in-law, testified that he was seated at the bar with the appellant, but that during the crucial 10 minute period he was in the rest room and did not hear or see any shots fired (Tr. 290, 296). When he returned from the rest room he saw a man lying on the floor [obviously Hicklin] and appellant was also on the floor. (Tr. 291-293). However, on cross-examination, Howard stated that the only person lying on the floor was his brother-in-law and that at no time did he see Mr. Hicklin (Tr. 293-294).

Dr. Robert Smith, a licensed physician (Tr. 323), testified that on February 9, 1963, he treated Mr. Hicklin at the emergency room of the Washington Hospital Center for a laceration to the left temple (Tr. 324-3). The doctor had no independent recollection of the patient but was able to relate only what the hospital records revealed (Tr. 325). The chart indicated "a two-inch laceration on the left side of the forehead" with "blood vessels ligated" requiring "suture repair." (Tr. 326.)

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, §502 provides:

> *Assault with intent to commit mayhem or with dangerous weapon.*
>
> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, §504 provides:

> *Assault or threatened assault in a menacing manner.*
>
> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

Rule 6(e) of the Federal Rule of Criminal Procedure, 18 U.S.C., provides:

> THE GRAND JURY. (e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any jury may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> INSTRUCTIONS. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 31 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> VERDICT. *(c) Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 52 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> HARMLESS ERROR AND PLAIN ERROR. *(b) Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Traditionally, the proceedings of a Grand Jury are secret and a transcript thereof will not be produced unless in the discretion of the trial court a "particularized need" is shown. *Pittsburgh Plate Glass Co.* v. *United States, infra.* The defense requested the transcript of the testimony before the Grand Jury of the witness Hicklin without such a showing. Certainly there was no abuse of discretion, for the testimony given was not that of a sole, key or important Government witness and cross-examination was exhaustive.

The trial court properly refused to allow cross-examination of the witness Butler where the questions asked called for a legal conclusion by a lay witness and where further questions asked were irrelevant to the factual issues to be determined by the jury. Further, such questions were not proper for impeachment purposes.

The evidence as shown by the Government clearly proved an assault with a dangerous weapon. The Testimony of the defense witnesses showed no assault of any degree, but merely an accidental collision. No evidence presented could support a verdict of guilty of simple assault, for should the jury disbelieve the the prosecution

witnesses and believe the defense, the only verdict consistent with the evidence would have been not guilty.

During the original charge to the jury the court informed the jurors that during their orderly deliberation of the case they should consider the views of their fellow members. Such an instruction given prior to any deliberation is clearly not coercive and is proper, for it cannot be the law that jurors must enter the juryroom with a blind determination and refuse to intelligently discuss the case with men of equal honesty.

ARGUMENT

I

The Trial Court's Refusal to Order Production of The Grand Jury's Transcript Was Proper.

It is traditional in judicial history that the proceedings before the Grand Jury are sacrosanct. Disclosure is to be made only when the need therefore outweighs the countervailing policy of secrecy. "To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959), *rehearing denied*, 361 U.S. 855.

When an accused seeks access to the proceedings of the Grand Jury, to show prior inconsistent statements, to use for impeachment or to attack the credibility of a witness, the burden is on the defense to show that "a particularized need" exists for the minutes; which need outweighs the long established policy of secrecy. *Pittsburgh Plate Glass* v. *United States, supra.* The defense does not have an absolute right to the Grand Jury minutes; but it may be disclosed only upon the discretion of the trial judge.

Rule 6(e), Fed. R. Crim. P., 18 U.S.C.[1] *DeBinder* v. *United States*, 110 U.S. App. D.C. 244, 292 F.2d 737 (1961). As a preliminary step to making the proceedings available for such purpose an examination *in camera* is required, and the necessity of demonstrating a particularized need extends equally to a request for an *in camera* examination by the Court. *Dennis* v. *United States*, 302 F.2d 5, 13 (10th Cir. 1962).

In the instant case, unlike those relied upon by appellant, the witness (Hicklin) whose Grand Jury testimony is sought is not an important witness. *Harrell* v. *United*, —— U.S. App. D.C. ——, 317 F.2d 580 (1963) (Government's principal witness); *Simmons* v. *United States*, 113 U.S. App. D.C. 369, 308 F.2d 324 (1962) (important prosecution witness); *Gordan* v. *United States*, 112 U.S. App. D.C. 33, 299 F.2d 117 (1962) (Government's case was based on the testimony of a single witness); *DeBinder* v. *United States*, *supra*, (the prosecution's case rested largely upon the testimony of a sole, key, eyewitness). Mr. Hicklin, although the victim of appellant's attack, was not particularly helpful to the prosecution's case for although he knew he was struck by a bottle, he was immediately rendered unconscious and did not know of the events that followed. Four other government witnesses provided the essential part of the case-in-chief.

Prior to testifying before the Grand Jury, Mr. Hicklin gave an oral statement to a government clerk and this statement was given to trial counsel for his use (Tr. 197-198). On cross-examination, Hicklin was asked whether he was hit immediately upon entering the door. He answered in the affirmative having already explained that by "immediately" he meant he "was hit shortly after I entered the door and walked to the bar and sat down on the stool" (Tr. 33.) His testimony is clear, he

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[1] The *Jenks Act* (18 U.S.C. 3500) is not the applicable provision under which a request for the production of the Grand Jury proceedings is made. *Jackson* v. *United States*, 111 U.S. App. D.C. 353, 297 F.2d 195 (1961).

frankly recalled prior statements and consistently explained that he was seated at the bar when he was attacked without provocation. Appellant does not and, submittedly cannot, show any prejudice as a result of the Grand Jury testimony not being made available to him. *Hance* v. *United States*, 299 F.2d 389, 398 (8th Cir. 1962).

In the instant case it is inconceivable that there was any reason for the trial judge, in the interest of justice, to be compelled to examine *in camera* the transcript of Hicklin's Grand Jury testimony. Certainly, such refusal was not an abuse of discretion. The defense had the statements Hicklin gave before testifying in the Grand Jury and he was vigorously cross-examined at the trial in minute detail regarding both material and collateral issues. In addition his testimony was corroborated by several other prosecution witnesses. *Simmons* v. *United States, supra.*

II

The trial court correctly prohibited irrelevant and improper cross-examination of witness Butler.

Appellant's trial counsel during cross-examination of Butler attempted to bring out the defense theory of the case: that Butler pulled a gun when appellant refused to leave, fired and missed, hitting a mirror, and as appellant fled he was struck by a second shot causing an accidental collision with Mr. Hicklin, knocking the complainant to the floor (Tr. 83-85). Thereupon, trial counsel asked two questions of the witness, to which objections were properly sustained. These questions of Butler called for a legal conclusion of a lay witness, i.e., whether, if the facts were as counsel previously stated, did he realize that he would be subject to a criminal charge. (Tr. 85.) Such questions calling for a legal conclusion are improper and the answer was correctly not allowed. *Bayless* v. *United States*, 200 F.2d 113 (9th Cir. 1952), *cert. denied*,

345 U.S. 929; *Myres* v. *United States*, 174 F.2d 329 (8th Cir. 1949), *cert. denied*, 338 U.S. 849. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

Butler was recalled as a Government rebuttal witness (Tr. 337) and during a bench conference appellant's counsel informed the Court that he desired to ask the witness whether he was charged with assault with a dangerous weapon by the police (Tr. 350). The court refused to permit such cross-examination (Tr. 351). Whether or not the witness was in fact charged is irrelevant for it has no bearing on the trial question of whether Hicklin was assaulted with a dangerous weapon by the appellant. *Taylor* v. *United States*, No. 17,737, decided July 25, 1963; *Simms* v. *United States*, 101 U.S. App. D.C. 304, 248 F.2d 626 (1957), *cert. denied*, 355 U.S. 875; *Beasley* v. *United States*, 94 U.S. App. D.C. 406, 218 F.2d 366 (1954), *cert. denied*, 349 U.S. 907; *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 207 F. 2d 19 (1953). Clearly, the proposed question was improper for the purpose of impeachment on the basis of prior criminal conduct. 14 D.C. Code 305.

The witness was properly, extensively cross-examined as to his bias and prejudice, but the witness' interest in the outcome of the case cannot be shown by use of improper and irrelevant questions. Moreover, the extent of cross-examination rests in the sound discretion of the trial judge. Here the exclusion of questions on cross-examination calling for a legal conclusion by a lay witness and irrelevant questions regarding possible arrest of the witness was proper.

III

The District Court's refusal to instruct on simple assault was correct.

The trial judge considered the charge of the lesser included offense of simple assault,[2] and rejected it, stating:

> "* * * Under the evidence in this case, he is either guilty or not guilty."
>
> * * * *
>
> "I don't think the evidence supports a verdict of a lesser offense than he is charged with." (Tr. 385).
>
> * * * *
>
> "I will not give [the instruction on simple assault] because there is no justification for it in the evidence." (Tr. 427).

This ruling by the court was correct. An instruction, pursuant to Rule 31(c) of the Federal Rules of Criminal Procedure, relating to a lesser offense should not be given unless there is some evidence to justify it. *Stevenson* v. *United States*, 162 U.S. 313 (1896); *Hansborough* v. *United States*, 113 U.S. App. D.C. 392, 308 F.2d 645 (1962). Where, as in the instant case, there is no evidence or legal possibility with which to support a verdict of the lesser offense of simple assault, such an instruction is not justified. *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951); *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947).

The law is clear that a lesser included offense instruction is required only if the evidence so permits. Upon a careful scrutiny of the evidence in the instant case no theory exists upon which the jury could properly have reached the conclusion that appellant was guilty of only simple assault. Here a verdict of guilty of an offense

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[2] Title 22, District of Columbia Code, Section 504. The Government does not argue that there are never occasions when a simple assault instruction might be given, but as will be demonstrated, the instant case does not support such an instruction.

less than the one specified in the indictment would have been a flagrant disregard of all the proof, and in violation of the juror's duty to render a true verdict according to the facts adduced from the witness stand. The evidence taken in this case, as shown by the Government, shows overwhelmingly an assault with a dangerous weapon. On the other hand should the jurors disbelieve the witnesses for the prosecution and agree with the appellant's version of incident—the only verdict could be that of not guilty. No testimony supports a middle ground and a compromise verdict would only be the jury's method of limiting the punishment proscribed by law. *Sparf* and *Hanson* v. *United States*, 156 U.S. 51 (1895).

Appellant was not entitled to an instruction on simple assault unless there was testimony from which a jury could find beyond a reasonable doubt that appellant committed simple assault, but not assault with a deadly or dangerous weapon. Appellant attempts to point to such evidence, but is unable to do so. Nine witnesses testified at appellent's trial. Basically two versions of the events which took place at the Starlight Restaurant on the evening of February 9, 1963, were related. Neither version is consistent with a theory that appellant committed a simple assault.

Summarizing the evidence as set forth in the Counterstatement of the Case, the Government's evidence showed that the appellant unmercifully beat the complainant with a beer bottle and a bar stool before the bartender fired two shots in an attempt to stop the vicious attack on Mr. Hicklin. The testimony as presented by the defense showed that following the two shots fired by Butler, allegedly at Williams, the appellant in an attempt to flee accidentally ran into Hicklin as he (Hicklin) was coming in the front door. Neither Hicklin nor the appellant added much to the story except that Hicklin stated he had entered the bar and seated himself at a stool before being assaulted and appellant remembers only the shots and his attempt to avoid being hit. The witnesses who were called by the prosecution all testified that the appellant used a beer bottle and bar stool in his attack on the com-

plainant, thus presenting the jury only with evidence of an assault with a weapon. Whereas the evidence presented by the defense did not show an assault in any degree but merely an accidental colliding, while appellant fled from an alleged assault upon himself. Clearly, neither theory of the testimony can support a verdict of simple assault. Appellant in his brief tries to show a "tussle" (Brief, pp. 35-38), but the following colloquy on redirect of James Morton, a defense witness, clearly demonstrates that this so-called "tussle" was in fact an accidental running into the complainant by the appellant:

> "Q. When you looked, you said, in answer to Mr. Collins' question, that you saw the defendant, Mr. Williams, run into Mr. Hicklin at the door?
> A. Yes, sir.
> Q. Is that what you are describing as a tussle?
> A. Yes, that's right." (Tr. 289.)

IV

The District Court's "final generalizations" to the jury were proper.

The charge to the jury was given in two parts, separated by an opportunity for counsel to make requests for further instructions. No objection was made to the second phase, which part is now alleged as erroneous. Failure of appellant to object to the charge as given before the jury retires to deliberate precludes assigning it as error in this Court. Rule 30, Fed. R. Crim. P., 18 U.S.C.; *Jones* v. *United States*, 113 U.S. App. D. C. 233, 307 F.2d 190 (1962); *Huffman* v. *United States*, 297 F.2d 754 (5th Cir. 1962); *Dukes* v. *United States*, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), cert. denied, 361 U.S. 865; *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958); *United States* v. *Furlong*, 194 F.2d 1 (7th Cir. 1952). This Court need not consider further this final contention of appellant. This part of the instruction was solely a sugges-

tion that following the selection of a foreman, orderly process for deliberation should be followed. This alleged erroneous part of the instruction does not require an exercise of discretionary authority under Rule 52(b), Fed. R. Crim. P., 18 U.S.C.

Appellant contends that plain error exists from the District Court's instruction which, allegedly encompassed the "*Allen charge.*"[3] Such a contention is erroneous; it is bottomed on the false assumption that part of the "*Allen charge*" was in fact given. The Supreme Court approved the instructions given in the Allen case; which instructions told the jury:

> that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if such the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. *Allen* v. *United States*, 169 U.S. 492, 501 (1896).

Certainly, the words spoken by the judge in the instant case, and considered in the context of the instructions given as a whole, were not those considered by the courts to be coercive. *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961); *United States* v. *Gordon*, 196 F.2d 886, 891 (7th Cir. 1952). It was a proper instruction suggesting an orderly dissemination of views by the jurors. It is quite clear that opinions may be

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[3] *Allen* v. *United States*, 164 U.S. 492, 501 (1896).

"changed by conference in the juryroom" for the "very object of the jury system is to secure unanimity by a comparison of views, and the arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments" of his fellow jurors. "It cannot be that each juror should go to the jury-room with a blind determination" and "close his ears to the arguments of men who are equally honest and intelligent as himself." *Allen* v. *United States, supra; United States* v. *Tellier*, 255 F.2d 441, 450 (2d Cir. 1958); *Papadakis* v. *United States*, 208 F.2d 945, 955 (9th Cir. 1953).

The objection to the so-called dynamite charge is the coercive effect it might have upon the jurors. *Campbell* v. *United States*, No. 17,185, decided March 21, 1963. Where such instructions are given subsequent to the jury's retirement to deliberate and a minority is determined their position is correct, the blasting effect of this type charge is far greater. But reason indicates, and courts have so held, that when it is suggested at the time of the initial charge to the jury that they listen to each others views the coercive effect is eliminated. *Holdridge* v. *United States*, 282 F.2d 302, 311 (8th Cir. 1960); *Janko* v. *United States*, 281 F.2d 156, 167 (8th Cir. 1960), *reversed other grounds*, 366 U.S. 716; *Nick* v. *United States*, 122 F.2d 660, 674 (8th Cir. 1941), *cert. denied*, 314 U.S. 687.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be affirmed.

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